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United States
Circuit Court of Appeals
For the Ninth Circuit.

BUN CHEW,

Appellant,

vs.

CHARLES T. CONNELL, as Immigration In-
specter in Charge,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

DEC 20 1915

F. D. Monckton,
Clerk,

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

For Appellant:

FRANK STEWART, Esq., 709-10 International Bank Building, Temple and Spring Streets, Los Angeles, California.

For Respondents:

ALBERT SCHOONOVER, Esq., U. S. Attorney, Los Angeles, California; and

CLYDE R. MOODY, Esq., Assistant U. S. Attorney, Los Angeles, California. [4*]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

ORIGINAL.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

Citation on Appeal.

United States of America,—ss.

The President of the United States to Hon. CHAS. T. CONNELL, as Immigration Inspector in Charge, and His Attorney, Albert Schoonover, United States Attorney in and for the Southern District of California, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals in the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an

*Page-number appearing at foot of page of original certified Record.

order allowing an appeal, of record in the clerk's office of the United States District Court, Southern Division, and District of California, wherein Bun Chew is an appellant and you are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said order allowing an appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. ———, United States Circuit Judge for the Ninth Circuit, United States of America.

BLEDSON, J.,

United States District Judge. [5]

Service of the within citation and copy thereof received this 21st day of July, 1915.

ALBERT SCHOONOVER,

U. S. Attorney.

By CLYDE R. MOODY,

Asst. United States District Attorney. [6]

[Endorsed]: No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the Matter of Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Citation on Appeal. Filed Jul. 21, 1915, at — Min. Past — o'clock —M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [7]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 692—CRIM.

In the Matter of the Application of BUN CHEW
for a Writ of Habeas Corpus. [8]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of BUN CHEW.

Affidavit and Petition.

To the Honorable BENJAMIN F. BLEDSOE,
Judge of Said Court:

Your petitioner, Bun Chew, being duly sworn, on oath deposes and says:

That he is unlawfully imprisoned and restrained of his liberty by Chas. T. Connell, Inspector in Charge, U. S. Immigration Service at the City of Los Angeles, in said District and Division, under and by virtue of a warrant of deportation heretofore issued by the Secretary of Labor of the United States, a copy of which said warrant is attached hereto, hereby referred to, made a part hereof and marked exhibit "A."

That said imprisonment and restraining of his liberty of said petitioner, Bun Chew, is unlawful in this:

1. That the said Secretary of Labor of the United States had no jurisdiction over the person of your petitioner and no jurisdiction or authority to issue said warrant.

2. That said Secretary of Labor exceeded his jurisdiction and authority and all jurisdiction and authority conferred upon him by law in and by issuing said warrant of deportation.

3. That your petitioner was not given a fair and impartial trial and hearing by the Immigration officers of the United *trial and hearing by the Immigration officers of the United* States precedent to the issuing of said warrant of [9] deportation and upon which said warrant is purported to be based; all of which will more fully appear by the record of the testimony and proceedings given and adduced at said hearing, attached to the petition for a writ of habeas corpus in the case entitled "In the Matter of the Application of Bun Chew for a Writ of Habeas Corpus," No. 853—Crim. of this Court, and marked exhibit "B," which said exhibit "B" in said case is hereby referred to and made a part hereof. And in addition to said exhibit "B," exhibits "C" and "D" attached hereto, which are and constitute copies of statements filed in said hearing and proceedings, subsequent to the hearing and judgment in said case No. 853—Crim. of this Court.

That said Secretary of Labor did not have jurisdiction of the person of your petitioner or of this case in this: That there was no evidence that your petitioner entered the United States within three years next preceding the date of his arrest on May

22d, 1914, and that your petitioner is, and at all times herein mentioned and referred to, was a Chinese laborer, lawfully domiciled and residing in the United States, he having registered as such Chinese laborer at Hanford, California, on February 17th, 1894, and at all times thereafter being the legal owner and actual holder of Chinese Laborer's Certificate of Residence No. 39,167; said date of his arrest he had said Certificate of Residence in his possession in the City of Los Angeles, California, when same was taken from him by the United States Immigration officials, and that said certificate is now wrongfully *withheld* from your petitioner by said officials.

That said Secretary of Labor had no jurisdiction to issue said warrant (Exhibit "A") directing that your petitioner be deported to China as there is no evidence that your petitioner came from China on the occasion of his last entry into the United States.

[10]

That said Secretary of Labor exceeded the jurisdiction and authority conferred upon him by law in this:

That said Secretary of Labor had not, at any time, any jurisdiction or authority to issue said warrant for the deportation of your petitioner, he being at the time of said issuance of said warrant of deportation, and at all other times herein mentioned and referred to, a Chinese laborer, regularly and lawfully holding a Chinese Laborer's Certificate of Residence, and lawfully being and residing in the United States by virtue of said Certificate of Residence.

That said trial and hearing, and proceedings for the deportation of your petitioner were unfair in this:

That the testimony and evidence adduced at said hearing which is contained in said exhibit "B" was and is insufficient and inadequate to permit or justify said Secretary of Labor in issuing said warrant of deportation, or justify the deportation of your petitioner; and that the conclusions of law on the part of said Secretary of Labor and other Immigration officials from the facts adduced at said hearing are erroneous and not sustained by said testimony and evidence in this: That said testimony and evidence shows that your petitioner is, and at all times mentioned herein, was a Chinese laborer lawfully domiciled and residing in the United States, holding and owning a genuine Chinese Laborer's Certificate of Residence and did not enter the United States on or about January 1st, 1912, without inspection or otherwise, and is not subject to deportation; whereas, said Secretary of Labor and other Immigration officials of the United States conclude erroneously from said facts, testimony and evidence, that your petitioner entered the United States from Mexico about January 1st, 1912, without inspection, and that your petitioner is, as a matter of law, subject to deportation from the United States. [11]

That said hearing was also unfair in this: That testimony was received against your petitioner in the nature of unsworn statements by persons in Mexico, whom your petitioner had no opportunity to

meet, see or cross-examine, and there was no evidence adduced showing that your petitioner is the identical person referred to in said unverified statements. Said statements purport to have been made by Lelisario Garcia and Guillermo Breton, and they appear on pages 24 and 25 of said exhibit "B."

Your petitioner further states that said warrant of deportation, exhibit "A" attached hereto, is void in law and absolutely invalid in that it directs the deportation of your petitioner to China, contrary to the law and the evidence affecting this matter; and for the further reason that it does not appear therein and cannot be ascertained therefrom, on what grounds or for what reason your petitioner is alleged to be unlawfully in the United States.

That your petitioner is lawfully within the United States, and is the owner of and entitled to the possession of said Certificate of Residence.

WHEREFORE, your petitioner prays that a writ of habeas corpus be issued, directed to said Chas. T. Connell, Inspector in Charge, U. S. Immigration Service, Los Angeles, California, in order that the cause of detention of said petitioner may be inquired into, and for such further order of court as may be found proper.

FRANK STEWART,
Attorney for Petitioner.

State of California,
County of Los Angeles,
Southern District of California,
Southern Division,—ss.

Bun Chew, being first duly sworn, deposes and says: [12]

That he is the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the same is true of his own knowledge and belief, except as to the matters which are therein stated on his information and belief, and as to those matters, he believes it to be true.

BUN CHEW.

Subscribed and sworn to before me, this 13th day of April, 1915.

[Seal]

RICHARD A. TURNER,

Notary Public in and for the County of Los Angeles,
State of California. [13]

Exhibit "A" [Warrant—Deportation of Alien].

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR,

Washington.

El Paso No. 5025/549.

Inc. 9644.

No. 53780/74.

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California:

WHEREAS, from proofs submitted to me, after due hearing before Immigration Inspector W. A. Brazie, held at Los Angeles, Cal., I have become satisfied that the alien

BUN CHEW,

who landed near the port of Douglas, Arizona, on or about the 1st day of April, 1912, is subject to be returned to the country whence he came under section 21 of the Immigration Act approved February

20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese exclusion laws, in that:

He entered the United States in violation of section 7, Chinese exclusion act of September 13, 1888, and rule 1, Chinese rules.

And WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector W. A. Brazie, held at Los Angeles, Cal.,

I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, in that: [14]

He entered in violation of Section 36 of said act (rule 13),

I, W. B. WILSON, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to China, the country whence he came, at the expense of the appropriation "Expenses of Regulating Immigration, 1915." You are directed to purchase steerage transportation for the alien from San Francisco, Cal., to his home in China, via sailing of the Pacific Mail Steamship Company, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 26th day of March, 1915.

[Seal]
EFH.

W. B. WILSON,
Secretary of Labor. [15]

Exhibit "C" [Certificate of Inspector Heath].**U. S. DEPARTMENT OF LABOR.****Immigration Service.****Office of Inspector in Charge,****Douglas, Arizona.**

I, FRANK W. HEATH, Inspector in Charge of the United States Immigration Service, at Douglas, Arizona, do hereby certify that I am the same Frank W. Heath before whom Guillermo Breton made a statement concerning one Bun Chew, on the 30th day of March, 1914; that said statement was typewritten from a verbal statement made by the said Guillermo Breton; that after said statement was typewritten the same was read back to the said Guillermo Breton; that thereafter the said Guillermo Breton signed the same; that at the time said statement was made I presented a photograph of the said Bun Chew to the said Guillermo Breton, a true and correct copy of said photograph so presented by me to the said Guillermo Breton being hereto attached, said photograph being marked "Bun Chew."

Given under my hand this 14th day of January, 1915.

FRANK W. HEATH,**Inspector in Charge.****[Photograph attached.] [16]**

Exhibit "D" [Certificate of Inspector Heath].**U. S. DEPARTMENT OF LABOR,****Immigration Service.****Office of Inspector in Charge,****Douglas, Arizona.**

I, FRANK W. HEATH, Inspector in Charge of the United States Immigration Service, at Douglas, Arizona, do hereby certify that I am the same Frank W. Heath, before whom Belisario Garcia made a statement concerning one Bun Chew, on the 28th day of March, 1914; that said statement was typewritten in English from a verbal statement in Spanish made by the said Belisario Garcia, which statement was interpreted from Spanish into English *from* Frank L. Dayton; that said Frank L. Dayton after said statement was typewritten in English, read the same back to the said Belisario Garcia, and interpreted the same to him in Spanish; that thereafter the said Belisario Garcia signed the same; that at the time said statement was made I presented a photograph of the said Bun Chew to the said Belisario, a true and correct copy of said photograph so presented by me to the said Belisario Garcia being hereto attached, said photograph being marked "Bun Chew."

Given under my hand this 14th day of January, 1915.

FRANK W. HEATH,**Inspector in Charge.**

[Photograph attached].

[Endorsed]: No. 962—Crim. In the District Court of the United States in and for the Southern

District of California, Southern Division. In the Matter of the Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Affidavit and Petition. Received Copy of the Within Affidavit and Petition this 13 day of April, 1915. Clyde R. Moody, Asst. U. S. Attorney, Attorney for ——. Filed Apr. 13, 1915, at 4 min. past 10 o'clock, A. M. Wm. M. Van Dyke, Clerk Murray C. White, Deputy. Frank Stewart, 709-10 International Bank Bldg., Temple and Spring Streets, Los Angeles, Cal. Office Phones: F-2222, Main 7777, Attorney for Petitioner. Let a Writ Issue, Returnable forthwith, before me. Bledsoe, Judge. April 13, 1915. [17]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 962—CRIMINAL.

In the Matter of the Application of BUN CHEW for a Writ of Habeas Corpus.

Stipulation and Order [as to Exhibit "B"].

Upon the stipulation set forth below and good cause appearing therefor:

It is hereby ORDERED that in the above-entitled case, the matter and contents of exhibit "B," attached to the affidavit and petition in Case No. 853—Criminal, of this court, may be deemed to be evidence and a part of the record in this case and that the same may be incorporated as such in any transcript on appeal in this case.

BLEDSON, JU.,
Judge.

It is hereby stipulated that the above order may be made.

CLYDE R. MOODY,
Assistant U. S. Attorney.
FRANK STEWART,
Attorney for Petitioner.

[Endorsed]: No. 962—Criminal. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of the Application of Bun Chew for Writ of Habeas Corpus. Stipulation and Order. Filed Jul. 21, 1915. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Frank Stewart, 709-10 International Bank Bldg., [18] Temple and Spring Streets, Los Angeles, Cal., Office Phones: F-2222; Main 7777, Attorneys for Petitioner. [19]

Exhibit "B"—Warrant Hearing.

Spl. 432 Sheet 1

WARRANT HEARING.

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service, Mexican Border District,
File No. 5528/450

May 22, 1914,

Time: 2:30 P. M.

In the Matter of Bun Chew, arrested pursuant to Department Telegraphic Warrant, dated May 22, 1914.

No. charged with: Entering the United States without inspection, in violation of Section 36 of the Immigration Act.

Hearing had before Immigrant Inspector W. A. Brazie, in the office of Insp. in Charge at Los An-

geles, California, on this 22d day of May.

Present: W. A. BRAZIE, Examining Officer.

CHARLEY LEVY, Interpreter.

W. A. BRAZIE, Stenographer.

Warrant presented, read and explained to the alien, who is advised of the nature of the proceedings and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of twenty-five hundred dollars (\$2,500.00).

Alien in good health.

[Testimony of Bun Chew at Warrant Hearing.]

Alien, being first duly sworn, testified as follows:

My name is Bun Chew; I am 51 years of age; a subject of China, and of the Chinese race; embarked for the United States from Hong Kong, China, and landed at the port of San Francisco, California, on or about 15 years ago; my destination at that time being San Francisco, Calif. The names and addresses of the members of my family in the United States and abroad are as follows: [20]

Wife, Chun Shee, residing in Ping Joe village, Nom Hoy district China.

Brother, Hom Sick Chew, residing at Visalia, California.

EXHIBIT "B."

Q. Are you positive you came to the United States 15 years ago?

A. No; 15 years ago was my return trip, but I came to the United States the first time when I was very young. I left this country on my visit to China about 16 years ago; don't remember the name

of the steamship; under name of Bun Chew, laborer, of Hanford, California; stayed in China about ten months; and returned to the United States about fifteen years ago; don't remember name of steamship; made the trip through San Francisco, California.

Q. Is that the only trip you have made to China?

A. Yes, that is all.

Q. What other trips have you made out of the United States? A. No others.

Q. What is your occupation?

A. Work on a ranch. Always been a laborer since I have been in this country.

Q. Have you a certificate of residence entitling you to be and remain in the United States?

A. You have it. (Refers to certificate of residence No. 39,167, attached to record.)

Q. When did you go to Mexico?

A. I was never in such a country.

Q. Did you not work in a restaurant at a place called Agua Prieta, just before you came to the United States the last time? [21]

A. No; I have never been in such a place.

Q. Now, tell me when and where did you enter the United States the last time?

A. I just told you about that; I landed at San Francisco about 15 years ago.

Q. Do you deny that you lived in Mexico and that you came from there to the United States?

A. I was never in Mexico; don't know where it is.

Q. I will now read you a statement made by Belisario Garcia, on March 28, 1914. (Statement read to alien.) What have you to say in regard to that statement?

A. No, sir; I never heard of that man.

Q. Do you remember a statement you made in this office on March 20, 1914? A. Yes.

Q. In that statement, which I now read to you, you said you were living at Vasalia, California, and that you left there the first month this year.

A. Yes; that is the truth.

Q. In that statement you also stated that you had made your headquarters at the store of Chun John, at Vasalia, California?

A. Yes; I said Chun John lived at the store of Quong Chung, and I made my headquarters at that store.

EXHIBIT "B."

Q. I will now read you a statement made by Chun John, on March 24, 1914. (Statement read to alien.) What have you to say about that statement? [22]

A. He will remember me when he sees me.

Q. I will also read to you a statement made by Dong Bow, on March 24, 1914: Dong Bow's other name is Dong Yuen Chung. (Statement read to alien.) What have you to say about that statement?

A. If he see me he will know me.

Q. He says he knows you but that he has not seen you for several years.

A. If he sees me he will know when he saw me last. He don't remember.

Q. I will read you a statement made by Do Wye, on March 25, 1914. (Statement read to alien.) What have you to say about that statement?

A. He thinks I am in China, but I never had any transactions with him, and he don't know anything about me.

Q. I will also read your statement, made in this office on March 20, 1914. (Statement read to alien.) You are advised that in this statement you show a lack of knowledge of the conditions in the vicinity of Vasalia and Hanford, California, during the past year. The examining inspector was stationed in that vicinity for a number of months recently and is familiar with conditions there, and you are at variance with the actual facts.

A. I was there until first month this year.

Q. After hearing all of these statements read, do you still deny that you were in Mexico about two years ago, and that you came from there within that time?

A. No question about it. I was never in that country.

Q. Did you smuggle into the United States for the purpose of being sent back to China?

A. I never smuggled into the United States; I belong here.

Q. You are now afforded an opportunity to inspect the warrant [23] of arrest and all the evidence upon which same was issued, including all of the statements which have been read to you, and you are advised of your right to be represented by counsel at this hearing. Do you wish to avail yourself of this right?

A. I will have to communicate with my friends and see if they will help me out. I have no money and they will have to help me. Can I have two weeks to write to my friends at Vasalia?

Q. Will it take two weeks to hear from your friends? A. Maybe sooner.

Q. I will continue this case for the period of two weeks if necessary, but with the understanding that if you are ready before the expiration of that time that the case will proceed. Is that satisfactory?

A. Yes.

The further hearing of this case is adjourned and continued until June 5, 1914, at 10:00 o'clock A. M. But if the alien desires to proceed with the hearing at an earlier date it is agreed that the case will proceed at such time.

W. A. BRAZIE,
Chinese and Immigrant Inspector.

EXHIBIT "B"

OFFICE OF INSPECTOR IN CHARGE.

Los Angeles, California,

June 5, 1914,

10:00 A. M.

Continued hearing in the case of Bun Chew, pursuant to the adjournment had on May 22, 1914.

[24]

PRESENT: W. A. BRAZIE, Examining Inspector and Stenographer.

CHARLEY LEVY, Chinese Interpreter.

FRANK STEWART, Attorney.

(Examining Inspector to Alien.)

Q. Have you secured counsel to represent you at this hearing?

A. Yes; this gentleman, Mr. Stewart.

(Examining Inspector to Attorney Stewart.)

Q. Mr. Stewart, the complete record in this case so far as it has proceeded is handed you for inspec-

tion, and you are advised that you have the right to offer any testimony in rebuttal of that produced by the Government. Are you ready to proceed with the case?

A. No. We have some witnesses at Vasalia, California, and vicinity, which we desire to bring here, and I will ask that the case be continued until June 16, 1914, at 10:00 o'clock A. M.

The further hearing of this case is adjourned and continued until June 16, 1914, at 10:00 A. M.

W. A. BRAZIE,
Chinese and Immigration Inspector.

OFFICE OF INSPECTOR IN CHARGE.
Los Angeles, California.

June 16, 1914, 10:00 A. M.

Continued hearing in the case of Bun Chew, pursuant to the adjournment had on June 5, 1914.

PRESENT: W. A. BRAZIE, Examining Inspector
and Stenographer.

CHARLEY LEVY, Chinese Interpreter.

FRANK STEWART, Attorney for
alien. [25]

EXHIBIT "B."

(Examining Inspector to Attorney STEWART.)

Q. Are you ready to proceed with the case?

A. Yes. Our first witness is Mr. Gilliam.

[Testimony of E. A. Gilliam, at Warrant Hearing.]

E. A. GILLIAM, being first duly sworn, testified as follows:

(By Attorney STEWART.)

Q. State your name, please.

A. E. A. Gilliam.

Q. Where do you live?

A. Visalia, California. Tulare County.

Q. How long have you lived there?

A. I was born in that county, and have lived in Vasalia most of the time.

Q. What is your age? A. 51 years old.

Q. What is your occupation?

A. Well, I am constable of Vsasalia township, and am a deputy sheriff and ranch a little.

Q. Which one of these occupations takes most of your time?

A. Most of my time is devoted to my official duties.

Q. How long have you held public office in that county?

A. I was city marshal of Vasalia, I think, three different terms in the early nineties. I am finishing my third term as constable of Vsasalia township. It will be twelve years the first of January.

Q. You were elected for four years? A. Yes.

Q. For the past twelve years you have been constable continuously? A. Yes, sir.

Q. How long deputy sheriff? [26]

A. Most of the time since the present sheriff has been in—nearly twelve years.

Q. And you hold your position now as deputy sheriff? A. Yes, sir.

Q. Were you night watchman in Vasalia?

A. I was; not at the present time. I was for about the neighborhood of four or five years, in the vicinity of Chinatown in Visalia.

Q. In what way did you become acquainted with the faces of Chinese in that city? A. Yes.

Q. I call your attention now to Bun Chew, the alien, and ask you if you know him? A. I do.

Q. Where have you seen him, Mr. Gilliam?

EXHIBIT "B"

A. Well, I am not sure that I have ever seen him anywhere except in Chinatown, Visalia.

Q. Are you sure that you have *sen* him in Chinatown, Vasalia? A. I am.

Q. What other places have you the impression that you have seen him?

A. I think I have seen him in a Chinese garden at one time near Farmersville, but I am not positive.

Q. Are you positive that you have seen him in Vasalia? A. Yes, sir.

Q. Would you see him many times or a few times?

A. Good many times, but I could not say how often, however.

Q. How long have you known him, Mr. Gilliam, by sight?

A. Well, his face has been familiar to me and most of the Chinese of the town for, I should say three or four years now, possibly longer. [27]

Q. Did your official duties take you into Chinatown five years ago? A. Yes, sir.

Q. And what is your best recollection as to whether you saw him about that time—about five years ago?

A. I could not be positive as to the time I first saw him, but he has been there quite often.

Q. Are you positive that you have seen him each year as long back as five years ago now?

A. Quite positive, yes, sir. I think I have seen him there frequently during the last four years.

Q. You have never seen him except in Tulare County and the vicinity of Vasalia?

A. Not that I remember of.

Q. You have assisted the immigration officers at various times in arresting Chinese suspected of being unlawfully in the country? A. Yes, sir.

Q. You always rendered the assistance when they asked for it? A. Yes, sir.

Q. And have gone into Chinatown with the immigration officers on their official visits?

A. Yes, sir.

Q. Have you any interest in this case?

A. None whatever.

Q. You have no particular friendship with this alien? A. No, sir.

Q. He has never done you any favor?

A. No, sir.

Q. Employed you in any way or paid you anything? A. No, sir.

Q. Mr. Gilliam, did you miss Bun Chew from Vasalia any time [28] during the past year?

A. I don't remember seeing him lately until just a few days ago.

Q. How long had it been since you saw him at Vasalia?

A. I could not say. I have not been in that end of the city as much for the last six or seven months as I had been prior to that for a good many years. I don't remember seeing him lately, not since China New Year, I think. I would not be positive I saw him then.

EXHIBIT "B."

but I think I did; I think he was there. I would not be positive when I did see him last, but think it was then.

Q. Would you say positively that you have seen him during the past year?

A. Yes; I am pretty sure I have seen him in the last 12 months.

Q. Do you know the Quong Chung store in Vasalia? A. Yes, sir, very well.

Q. And Chun John, the manager? A. Yes, sir.

Q. Do you know whether Chun John has any interest in the fruit business?

A. Yes, he owns, I think 20 acres, or he represents a company that owns that much, and it is planted to apricots, prunes and peaches and they are now busy gathering their crop. Chun John has charge of this part of the business and is prettty busy now.

Q. Is the Quong Chung located in Chinatown in Vasalia? A. Yes, sir; opposite the joss- house.

Q. Have you ever seen Bun Chew in the vicinity of that store?

A. I think I have seen him near the joss-house. It is a kind of hang-out for loafers.

Q. That is all. [29]

[Stipulation as to E. A. Gilliam.]

It is stipulated that E. A. Gilliam is an old and reputable citizen of Vasalia, and that he is a craeful and conscientious officer.

[Testimony of Sick Chew, at Warrant Hearing.]

SICK CHEW, being first duly sworn, testified as follows:

(By attorney STEWART.)

Q. What is your name? A. Sick Chew.

Q. Where do you live? A. Vasalia, California.

Q. How old are you? A. 54.

Q. What is your occupation? A. Laundryman.

Q. Have you ever worked on gardens? A. Yes.

Q. In the vicinity of Vasalia? A. Yes.

Q. Where did you register? A. San Francisco.

Q. When did you go to Vasalia; how many years ago? A. In the year 1910.

Q. Where did you live before that?

A. Bakersfield, California.

Q. How long did you live at Bakersfield?

A. For three or four years.

Q. Were you ever at Nanford, California?

A. Yes, sir.

Q. How long were you at Hanford,—near Hanford? A. About two years. [30]

EXHIBIT "B."

Q. Do you know the alien, Bun Chew?

A. Yes, sir.

Q. How long have you known him?

A. He is my brother. I have known him ever since he was born.

Q. Do you know where your brother registered—Bun Chew? A. Hanford, California.

Q. How far is Hanford from Vasalia?

A. About 20 miles.

Q. Do you know whether your brother, Bun Chew, was ever around Vasalia? A. Yes, sir.

Q. How long has Bun Chew, to your knowledge, been around in the vicinity of Vasalia?

A. Between Hanford and Vasalia about 7 or 8 years.

Q. Do you know what his occupation has been during that time?

A. He worked on a farm, and he worked at different places.

Q. Did you ever see him on these farms?

A. Yes, sir.

Q. Did he ever go to visit you where you were?

A. Yes, sir.

Q. How often have you seen him during the last five years on an average?

A. Once or twice a year.

Q. Has there been any time during the last five years that you have not seen Bun Chew for more than a year?

A. Well, I saw him each time I visited Vasalia.

Q. Has as much as a year gone by that you did not see him in the last five years?

A. I saw him every year in the city. He did not do much work. He is lazy. He didn't work much.

Q. Are you positive that he has been in Tulare County all the time during the past year, up to, about up to the early part in this year sometime?

A. Yes, sir.

Q. Do you know whether Bun Chew left Vasalia sometime early this year, a few months ago?

A. Yes, I know that much.

Q. Did you have anything to do with his going away?

A. Well, I sent him away to Phoenix.

Q. You sent him away?

A. Well, I paid his fare. [31]

Q. Didn't he have any money?

A. I paid his way. No, he didn't have any money. I paid his way.

Q. Why did you want to send him to Phoenix?

A. Well, I hoped he would repent himself, and he owes me several hundred dollars, so I wanted to send him away that he might repent himself and pay me the money back.

Q. He was not doing much around where you were living, is that right?

A. He didn't do much work, so I hoped he would set out in the country town and make money and pay me back.

Q. He was borrowing money and living off of you considerable was he?

EXHIBIT "B."

A. Yes, sir.

Q. And you had to pay his way to Phoenix?

A. Yes, sir; I paid his way and gave him \$10 to keep in his possession.

Q. Who bought the railroad ticket? A. I did.

Q. When was that?

A. Little—latter part of the first month, Chinese old calender this year.

Q. That would be February of this year, American calander? A. Yes.

Q. Do you know the exact date?

A. No; I don't know the exact date.

Q. Then you know of your own knowledge, do you, that Bun Chew has been in California during all the past five years up until February, 1914?

A. Yes, sir.

Q. Do you know the Quong Chung store, in Vasalia? A. Yes, sir.

Q. Did you ever see Bun Chew around the Quong Chung store? [32]

A. Yes; sometime I saw him there.

Q. Do you know the manager, Chun John?

A. Yes, sir.

Q. Do you know why he declined to recognize the photograph of Bun Chew sometime ago?

A. Yes; I know that.

Q. Then why did he not recognize that photograph?

A. Because he knew I sent Bun Chew to Phoenix, Arizona, and the case was sent from Los Angeles, and he thought that Bun Chew might have murdered somebody or something else happened, and for that reason he said he didn't recognize the photograph.

Q. Has he told you since that time that he did know Bun Chew, and that he did not want to get mixed up in it and therefore didn't want to recognize the photograph?

A. Yes, he told me about that.

Q. That is all.

Cross-Examination

(By Examining Inspector.)

Q. When did you see Bun Chew in Vasalia or that vicinity last?

A. The latter part of first month present year.

Q. Where did you see him then?

A. At Vasalia.

Q. You state you bought his railroad ticket from Vasalia, California, to Phoenix, Arizona?

A. Yes, sir.

Q. What did you pay for that ticket?

A. \$21.65.

Q. What railroad did you buy that ticket from?

A. Old railroad. Southern Pacific. [33]

NOTE: The railroad fare from Visalia, California, to Phoenix, Arizona, via Southern Pacific Railroad, is \$22.55, and not \$21.65, as testified to by this witness.

[Testimony of Bun Chew, at Warrant Hearing.]

BUN CHEW, the alien, being first duly sworn, testified as follows:

(By Attorney STEWART.)

Q. Up to February or about February of this year in what city have you lived for the past five years?

A. California.

Q. Have you been out of California until prior to the year 1914, for the past five years? A. No.

Q. Do you know Mr. Gilliam, the witness who has testified in this case?

A. Yes, sir. I saw him quite often when I visited Chinatown in Visalia.

Q. How many years has it been since you first saw Mr. Gilliam? A. More than four years?

Q. How much more than four years?

A. Between four and five years. I don't remem-

ber exactly. He is constable at Visalia.

Q. Do you know where the joss-house is in Visalia?

A. Upper story of the Lee Hing store.

Q. Did you spend very much time around in front of the joss-house?

A. Yes, sir; I spent lots of time there. I make my headquarters there.

Q. Is that across the street from the Quong Chung store? A. Yes, about opposite.

Q. Do you know why Chun John, the manager of the Quong Chung store, failed to identify your photograph when the inspector [34] took it there some time ago?

A. Yes; I know that. Because I received a letter from him. The letter said, "I understand you went to Phoenix, and officers had your photograph and come here to investigate it, and I was surprised to see the photograph, and did not know if this was your photograph or some one else, so I failed to tell anything to the inspector."

Q. He didn't want to get mixed up in it at all, is that it?

A. Yes; he didn't want to interfere, because he knew I went to another part of the country, and he thought maybe I killed somebody or some kind of accident, and for that reason he didn't want to tell anything.

Q. You have been up to Visalia since you got out on bail, have you? A. Yes, a few days ago.

Q. Did you see Chun John? A. Yes, sir.

Q. Did he tell you the inspector had the photograph up there asking whether he could identify it

as your photograph?

A. Yes, we spoke about it.

Q. Do you know one Guillermo Breton, a man who lives in Douglas, Arizona? A. No.

EXHIBIT "B."

Q. A man who used to be employed and is now employed by a railroad company running into Agua Prieta, Mexico?

A. I don't know anything about him. I never been in that part of the country.

Q. Were you ever employed in or connected with a restaurant at *Augua* Prieta, Mexico?

A. No, sir; I don't know how to work in a kitchen. I never did [35] work in a kitchen there.

Q. Did you ever have any experience or any time wait on a table or cook or do anything around a restaurant?

A. No, sir. I never did such kind of work, except that I was dishwasher for three days at Phoenix, in a Chinese restaurant.

Q. Were you ever in Mexico?

A. No, sir. I don't know whether Mexico is in the north, south, east or west.

Q. Do you know one Belisario Garcia?

A. No, sir.

Q. Do you know a man who resides at Agua Prieta, Mexico, who is Major in the constitutionlists army?

A. No, sir; I don't know anything about him.

Q. Were you ever acquainted with a Chinaman called "El Perico"?

A. No, sir. I never heard anything about this.

Q. Did you ever play poker?

A. Yes, sir. Some time ago.

Q. Where did you play poker?

A. At the Hop Lung garden about two years ago.

Q. Where is that? A. At Visalia.

Q. Did you ever gamble anywhere else. I mean play poker anywhere else? A. No.

Q. Never play poker in a saloon of one Ben Cooper, in Agua Prieta, Mexico?

A. No, sir; I never in that country there.

Q. It is a common thing among Chinese to gamble in some form, isn't it?

A. Just for fun sometimes.

Q. Sometimes when you are not working you have a little game of fan-tan or some Chinese or American game? [36]

A. I don't play fan-tan, but I play dominoes.

Q. Did you ever follow the occupation of gambling for a living?

A. No; I don't know that far myself.

Q. You never made money at gambling, is that it?

A. Sometimes I make a little and sometimes I lose.

Q. Your gambling consisted of playing a game occasionally when you were out of work, and only to pass the time away? A. Yes.

Q. Did you have any money outside of what your brother gave you when you left Visalia for Phoenix?

A. \$4 or \$5.

EXHIBIT "B."

Q. Then you had about \$14 or \$15 after your brother had given you your railroad ticket?

A. Yes, sir.

Q. Had you spent all the money you had and what little you earned at Phoenix, or part of that money before you started back to California?

A. No. I didn't spend anything of that money. I spent what I earned in that Chinese restaurant as dishwasher. I figured to myself that \$15 will pay my way to California or some distance.

Q. Is that the reason you started out to tramp part of the way back to California?

A. Yes, sir. Because I knew I didn't have enough money to pay my way back, and I could not secure work there. Even if I had got work, they only paid me a dollar and some cents a day. I travel on the road and pay a little way. [37]

Cross-examination.

(By EXAMINING INSPECTOR.)

Q. Why did you not bring Chun John here from Visalia to testify for you; you have brought two other witnesses from there?

A. He has a fruit garden there to attend to and he could not get away from it.

(Attorney STEWART to Examining Inspector.)

This is all we have to offer and the case may now be closed. I will file a brief in this case within the next two days, and will ask that I be granted that length of time.

(Examining Inspector to ALIEN.)

Q. Have you anything further to say or to offer to show cause why you should not be deported in conformity with law? A. No.

FINDINGS.

From the foregoing it is found that the alien, Ben

Chew, the person named in the above-mentioned warrant, is alien, native and citizen of China; that he is unlawfully within the United States, in that he entered therein on or about January 1, 1912, without inspection as contemplated by the Immigration Act; and further, that said entry was effected from Mexico at or near Douglas, Arizona, at a point on the land border other than as designated by the Secretary of Labor, in violation of Section 36 of the Immigration Act.

RECOMMENDATION.

Three years not having elapsed since the entry of the alien herein mentioned, it is respectfully recommended, in accordance with

EXHIBIT "B"

Sections 20, 21 and 35 of the Immigration Act, that he be [38] deported to the country whence he originally came, to wit, China.

W. A. BRAZIE,

Chinese and Immigrant Inspector.

Certificate of Stenographer to Transcript of Record of Warrant Hearing.

I hereby certify that the foregoing is a true and correct transcript of the record of hearing in this case.

W. A. BRAZIE,

Stenographer.

NOTE: The above-named alien has been released from custody during the pendency of this case, under bond in the penalty of \$2,500.00. [39]

**Application for Warrant of Arrest Under Sections
20 and 21 of the Act of February 20, 1907.**

U. S. DEPARTMENT OF LABOR,
Immigration Service.

L. A. File No. 5555/128.

(Place) Los Angeles, California.

May 21st, 1914.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of BEN CHEW, Male, Chinese Alien (Telegraphic warrant applied for this date from Los Angeles, Cal), the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true: (1) (Here state fully fact which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

That the above-named alien is unlawfully within the United States in that he entered therein on or about April, 1912, without inspection as contemplated by the Immigration Act; and further that said entry was effected from Mexico at or near Douglas, Arizona, at a time and place other than as designated on the land border by the Secretary of Labor, in violation of Section 36 of the Immigration Act. No verification of landing, Form 505, attached. No record extant. See statement of alien, marked exhibit "A." See, also, statements attached hereto,

marked exhibits "B," "C," "D," "E" and "F."
Bond recommended \$2,500.00.

(2) The present location and occupation of above-named alien are as follows: In detention, Los Angeles, California. [40] Laborer.

Pursuant to Rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

(Signature) CHAS. T. CONNELL,
(Official Title) Inspector in Charge.

JAC.

Approved and forwarded:

Supervising Inspector.

EXHIBIT "B"

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge.

Los Angeles, Calif.

5555/128.

March 20, 1914.

Time: 2:00 P. M.

In re BUN CHEW, Under Investigation.

CHAS. T. CONNELL, Inspector in Charge.

CHARLES LEVY, Chinese Interpreter.

W. A. BRAZIE, Acting Stenographer.

Inspector in Charge CONNELL to ALIEN:

You are advised that I am a United States Immigration officer, charged with the enforcement of the

Chinese exclusion and the immigration laws, with power to administer an oath. A statement is desired from you touching your last entry into [41] the United States, and any statement you may make may be used for or against you in court; and such statement shall be voluntary upon your part. Do you desire to make a statement?

A. Yes, I am willing to make a statement.

[Statement of Bun Chew.]

Alien, being first duly sworn, upon oath, testified as follows:

Q. What is your name? A. Bun Chew.

Q. What is your married name?

A. Tom Dung Wah.

Q. How many children have you?

A. I only have one boy who died.

Q. How old was he?

A. He died about fourteen or fifteen years ago.

Q. Only a few months old? A. Yes.

Q. Are you a person of Chinese descent?

A. Yes.

Q. Born in China? A. Yes.

Q. When did you first come to the United States?

A. About the year K. S. 5 or 6.

Q. Have you a certificate of residence?

A. Yes. (Presents certificate of residence No. 39,167, issued in the name of Bun Chew, residing at Hanford, California, occupation, farm hand; height 5 ft. 6 in.; color of eyes, dark brown; complexion, dark; physical marks or peculiarities for identification, long face, large under jaw protruding, ears stand out. Same being dated February 17,

1894, and signed O. M. Welburn, Collector of Internal Revenue, First District of California.)

Q. When did you visit China since you received your certificate? [42]

EXHIBIT "B."

Bun Chew,

Mar. 20, 1914.

A. Since—once I make a visit about 14 or 15 years ago; but I don't remember what year it was. I went as a laborer; departed from the port of San Francisco, California; name of steamer unknown.

Q. What month of the year?

A. Latter part of the 12th month.

Q. Now, you are advised that I can find the record, if you are not telling me the truth?

A. Yes; I make a paper out at Hanford, California.

Q. Now then, you made another trip to China?

A. (In English.) Yes, sir.

Q. When was that?

A. That is the only trip I ever made.

Q. When did you return from China the first time after you received your certificate?

A. I stayed in China about 10 months and returned to the United States. I don't know what year it was, and I don't remember the steamer I returned on.

Q. When did you leave Hanford last?

A. About 4 or 5 years ago.

Q. What were you doing in Hanford?

A. Farmer; vegetable garden.

Q. What garden? A. Nom Sing garden.

Q. How far from Hanford?

A. Little over a mile west.

Q. Who owned that garden?

A. Nom Sing. Went from there to Visalia. [43]

Q. How long did you stay at Visalia?

A. Altogether about 7 years.

Q. You just told me you left Hanford about 5 years ago. How do you make that out?

A. Because I have been there before.

Q. What *were* you doing in Visalia?

A. Farming and dealing in fruit business.

Q. Who did you work for last in Visalia?

A. Worked in Quong Song garden.

Q. Where is it located?

A. About three miles from Visalia, southwest.

Q. Has that place a name?

A. Next to the Wing Song garden, about one mile away from the Quong Song garden. (Stenographer's note: The name of the place is Farmerville, a station on the S. P. railroad, between Visalia and Exeter.)

Q. Does the street car run through there?

A. Electric car near there.

Q. When did you leave there?

A. Since Chinese New Year.

Q. I want the date.

A. I left my job about Chinese New Year, but I visited there once in a while, and about 30 days ago I left there, and have never been back since.

Q. How long did you hold that job when you quit?

A. About two years and three months.

Q. Can you name any men who were on that garden when you left? [44]

EXHIBIT "B."

Bun Chew.

Mar. 20, 1914.

A. The boss was Haw Yo Way. Haw Yo Hun; and the hired men, Chuey Tong and Dong Bo. That is all there.

Q. When was your last Chinese New Year? What was the date? A. About February 5th.

Q. What firm did your garden deal with in Visalia? A. Quong Chung.

Q. What kind of a looking man was the manager?

A. Chen John, quite tall man, between 55 and 60 years old, grey hair, weight, about 160 pounds.

Q. Did you do business with him too? A. Yes.

Q. What is next door to this firm, on the east end?

A. I don't remember. On the other side is a gambling house. They had a woman in the Quong Chung store, wife of Chen John. It seems to me that the Quong Chung store faces to the north.

Q. When you left Visalia thirty days ago, where did you go?

A. I didn't get out of town 30 days ago. I stayed at the Tunk Shuck Gong store in Visalia.

Q. How long? A. About one month.

Q. When did you leave Visalia—how long ago?

A. About three weeks and two days ago.

Q. Where did you go?

A. Phoenix, Arizona.

Q. Did you go by train? A. Yes, sir.

Q. How did you go? Give me the route you took?

A. S. P. Co. to Los Angeles, to Phoenix.

Q. What time did you leave Visalia?

A. About 8 or 9 A. M. [45]

Q. What time did you get to Los Angeles?

A. 3 or 4 P. M. same day.

Q. Did you change cars at Los Angeles, or did you go right through? A. Changed cars.

Q. How long did you wait in Los Angeles?

A. About half an hour.

Q. And you went straight through on a car to Phoenix? A. Yes, sir.

Q. Did you change cars on the way from Los Angeles to Phoenix? A. I don't know. No.

Q. Did you go in the smoking car or the sleeping car? A. In the smoking car.

Q. How much did your ticket cost from Visalia to Phoenix?

A. I don't know, because the ticket from Visalia to Phoenix was purchased by my brother, Hom Sick Chew.

Q. What time did you arrive in Phoenix?

A. About 5 or 6 A. M.

Q. The next morning, or how many days after?

A. Next morning.

Q. When you got to Phoenix where did you go—who did you stop with?

A. I stopped at the Dock Hing restaurant, but I don't know the American name of that restaurant, at 2123 Adams St., Phoenix, Arizona?

Q. How many Chinese in that restaurant? [46]

EXHIBIT "B."

Bun Chew,

Mar. 20, 1914.

A. Four; I saw.

Q. Can you give their names?

A. Hung Chuck, Chan Sue Pong. These are the two bosses. One was a Jung man and the other was

a Chan man. I forget their names now.

Q. How long did you stay there?

A. I worked there for three days, washing dishes.

Q. Are there any street-cars in Phoenix?

A. Yes.

Q. Were they driven by horses, or trolleys?

A. Electric cars.

Q. Was there a street-car running right in front of this restaurant on Adams street?

A. Yes.

Q. Where did you go after you left the restaurant after working there three days?

A. Then I went to the Lung Gee vegetable garden, a little over one mile southwest. The manager is Lung Way.

Q. How long did you stay there?

A. I didn't stop there long. Sometime I stay there for a night, and then I went back to that Chinese restaurant, which I mentioned and stayed there over night.

Q. How many days altogether were you around the ranch after you left the restaurant?

A. About three weeks.

Q. Are you sure now it was three weeks you worked around the garden?

A. No; I meant I departed from Visalia to Phoenix and to Los Angeles, altogether for three weeks and three days.

Q. Now, then, where did you go from Phoenix?
[47]

A. I left Phoenix on foot. My intention was to return to Visalia, California, and I walked from

Phoenix to Tucson, and one town past Tucson. Then I got on the car.

Q. How long did it take you to walk from Phoenix to Tucson?

A. I walked three days but once in a while I am tired, so I rest.

Q. Did you cross any river with any water in it?

A. No.

Q. Did you walk on the wagon-road, which the wagons take, or how?

A. I followed the wagon-road.

Q. Did you pass through any towns on your way from Phoenix? A. No.

Q. You didn't walk on the railroad track then?

A. Yes; also on the railroad track, too.

Q. When you came to Tucson what did you do?

A. I went into the town at Tucson to buy some food—bread, etc.—and walked. I figured myself—I had only \$15 in my possession, and I figured the railroad fare from the place to Visalia. Then I go into the station to buy a ticket.

Q. Then you got in this car?

A. No; I entered that car next town from Tucson.

Q. This way or the other way?

A. This way—the Los Angeles way.

Q. Did you meet any Chinamen in Tucson?

A. Yes.

Q. Who?

A. I met a Chinaman on the street, but did not speak to him. [48]

EXHIBIT "B."

Bun Chew.

Mar. 20, 1914.

Q. Is it not true that you got into the car at

Tucson? A. Yes, sir.

Q. You got into this freight car loaded with coke at Tucson? A. Yes, sir.

Q. What time of the night was it when you got into the car? A. Just dark.

Q. How did you get into the car?

A. I climbed up the side door, which was open. And after I got in some employees shut the door.

Q. Was the door open when you got in?

A. Yes; the door was open.

Q. And you climbed up, did you, on the coke?

A. Yes, I climbed up.

Q. Who gave you the water and grub you had in there? A. None.

Q. Didn't you have any water or grub on the way?

A. I bought the grub and took some water with me.

Q. What did you have the water in?

A. I had a bottle to carry the water in?

Q. You must have known then, you were going to get into that car, if you were prepared with water and grub?

A. I had that outside. When I entered the car I had nothing—everything used up.

Q. When did you leave Benson or Fairbank?

A. I don't know such places.

Q. How long after you got in the car was it that the car door was shut and a seal put on?

A. I don't know when they locked it. If I knew he locked it [49] would have *hollered* to him to let me out.

Q. Didn't you hear them talking and working at the door when they locked it?

A. No; I didn't hear that, because I was so tired I laid there and took a rest.

Q. How big a town is Tucson?

A. Quite a large town, looks to me.

Q. Where did you sleep there in town before you got into the car? What store or ranch?

A. I didn't see any house. I had a pair of blankets and I laid down when I got tired.

Q. How long after you got into the car was it before the train started?

A. I don't know how long it was. When the man came to shut—lock that car, one of the other tracks had a car running. That is the reason I did not hear him.

Q. Were there any Chinese arrested at Visalia last July?

A. I don't know, but I understood they made investigations there, but who was arrested I don't know.

Q. Have you ever been a witness in any case where Chinese claimed nativity? A. No.

Q. Do you know any Chinese born in the United States?

A. Yes; I remember the children born to the manager of Lai Wah On, but I don't remember their names, the street or the date of their birth. [50]

EXHIBIT "B."

Bun Chew,

Mar. 20, 1914.

Q. Do you know any Chinese born in Visalia?

A. No.

Q. Do you know a Chinese in Visalia by the name of Tai Choy? A. It is a woman.

Q. Have you understood the interpreter?

A. Yes.

BUN CHEW.

(Chinese Characters.) [51]

[Statement of Beisaria Garcia.]

EXHIBIT "B."

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

In answering refer to
No. ———

Received
Apr. 1, 1914
Immigration Service
Tucson, Ariz.
March 28, 1914.

STATEMENT.

I, Beisaria Garcia, hereby affirm on honor that I am a citizen of Mexico and that I have been a resident of Agua Prieta, Sonora, Mexico, for fourteen years last past; that I am by occupation a Major in the Constitutionlists Army of Sonora, Mexico, and that I am well acquainted with the Chinese residents of Agua Prieta, Mexico. I positively identify the photograph, marked "Bun Chew" on the back thereof, which is now before me, as that of a Chinaman who was connected with the management of a Chinese restaurant in Agua Prieta, Mexico, for about two years and until about three years ago. He seemed to be a partner of a Chinaman known by the name of "El Perico" as they were very much together and I have often seen him and "El Perico" playing poker in the saloon of the late Ben Cooper in Agua Prieta, Mexico. I never knew the name of this Chinaman whose photograph is now before me

and whose name is given thereon as "Bun Chew." I used to see him frequently in the Chinese restaurant run by him and "El Perico" and I have also [52] frequently seen him and "El Perico" go back and forth between Agua Prieta and Naco, Sonora, Mexico, by wagon. At that time the Chinese used to go back and forth from Agua Prieta to Naco, Mexico, in hired wagons.

They now have a wagon of their own.

BELISARIO GARCIA.

Signature.

I hereby certify that the above statement was given before me at Douglas, Arizona, this 28th day of March, 1914.

FRANK W. HEATH,

Inspector in Charge.

I hereby certify that the above statement is a true translation as given in Spanish and translated therefrom, by me, into English.

FRANK L. DAYTON,

Interpreter and Stenographer. [53]

[Statement of Guillermo Breton.]

EXHIBIT "B."

DEPARTMENT OF COMMERCE AND LABOR.

Immigration Service.

Received

Apr. 1, 1914.

Immigration Service.

In answering refer to

Tucson, Ariz.

No. ———

March 30, 1914.

STATEMENT.

I, Guillermo Breton, hereby affirm on honor that

I am a citizen of Mexico; that I have resided in Douglas, Arizona, continuously during the past eighteen months; that previous to my residence in Douglas, Arizona, I lived at Nacozari, Sonora, Mexico, for about seven years; that I speak the English language fluently; that I have been in the employ of the Nacozari Railroad Company for the past eight years and I am now Cashier of that company; that I positively recognize the photograph now before me, which is marked "Bun Chew" on the back thereof, as being that of a former resident of Agua Prieta, Sonora, Mexico. Previous to my coming to Douglas, Arizona, to live, and during my residence at Nacozari, Mexico, I used to make frequent trips to Agua Prieta, Mexico, and at such times I would take my meals at a Chinese restaurant in Agua Prieta, I saw this Chinaman, whose photograph is marked "Bun Chew" a number of times at the Chinese restaurant in Agua Prieta, Mexico, when I used to eat my meals there. He seemed to be connected in a business was with the restaurant. To the best of my recollection, it has been about two years since I saw this Chinaman the last time.

G. BRETON.

Signature.

I HEREBY CERTIFY that the above statement was given before me at Douglas, Arizona, this 30th day of March, 1914.

Inspector in Charge. [54]

[Statement of Chun John.]

EXHIBIT "B."

DEPARTMENT OF LABOR.

Immigration Service.

Fresno, California, March 25, 1914.

In re BUN CHEW, under investigation at Los Angeles, Cal.

Statement taken March 24, 1914, at the Quong Chung Store, Visalia, Cal. Time 10:30 A. M. Inspector, Menifee. Interpreter, C. H. L. Seetoo.

Chun John, being sworn, testifies:

Q. What are your names?

A. Chun John, marriage name is Chun Dock Bing.

Q. When and where born?

A. 57 years of age, 5/15, in Luk Di Kong villiage, Nam Hoi, China.

Q. When did you first come to the U. S.?

A. K. S. 5 SS unknown, and have made three visits, 1st K. S. 12/3 SS "Australia," Eagle paper, returning K. S. 13/4 "Coptic." 2d, K. S. 13/8 "Oceanic" retng K. S. 14/4, Eagle paper. 3d, K. S. 30/10, "Manchuria," as a Merchant, Yee Wo Co, Visalia, Cal., returning K. S. 31/3, SS "Coptic." Was married K. S. 13 to Hoy She, in home village in China, and have two boys, Chun Gee Gom, born K. S. 15, Chun Gee Sum, born K. S. 32/2, in home villiage. Was registered as laborer, but my certificate was burned in this city in K. S. 26 (Presents Bureau letter No. 53,496/77, Aug. 16, 1913) and my application for duplicate was denied.

Q. Do you know a Chinese named Haw Yo Way?

A. Yes, he returned to China last year.

Q. Do you know a Chinese named Haw Yo Hun?

A. No. [55]

Q. Do you know Chusy Fong?

A. I think he is in Bakersfield.

Q. Do you know Dong Bo?

A. He is working on the Quon Wah Garden, 9 miles from here.

Q. Do you know Bun Chew? A. No.

Q. Do you know Tom (Hom) Dung Wah?

A. No.

Q. Do you know Hom Sick Chew?

A. Yes, he is a partner of Dong Bo, on the garden.

Q. Where is the Nom Song Garden?

A. Near Hanford.

Q. Where is the Wing Song Garden?

A. Closed two years ago?

Q. Where is the Quong Song Garden?

A. Near the Wing Song garden, about 5 miles from here, closed last year.

Q. Do you recognize this (Bun Chew) photograph?

A. (After long inspection, and some hesitation.)
No. [56]

[Statement of Dong Bow.]

EXHIBIT "B."

In re BUN CHEW, Cont'd.

Statement taken at the Quong Wah garden, 9 miles east of Visalia, Cal. 2 P. M. March 24, 1914.

Witness, being sworn, testifies:

Q. What is your name?

A. Dong Bow, marriage name is Dong Yuen Chung.

Q. When and where born?

A. H. G. 8/7 in Sac Sing villiage, Nom Hoi Dist., China.

Q. What are your parents' names?

A. Father, Dong Hoy, Mother, Jung She, both dead. No brothers or sisters. I came to the U. S. K. S. 7/3, SS. "Belgic," to San Fran, made one visit, K. S. 27/11, SS. "Coptic," returning K. S. 28/8 SS. "Gaelic," Laborer. Married to Ow She, before came to the U. S. No children. Registered in Visalia, California, but don't know the No. and the certificate was destroyed in a fire on the Nom Sing garden, near Hanford, Cal., 6th month, year before last. (June, 1912.) I worked at that garden three years and left there soon after the fire, and came here to this garden for two years, then went to the Asparagus Cannery, near Sacramento and worked for four months, returning to this place about a month ago. I intended to get my trunk which was at the Nom Sing garden, in July but it burned in June, 1912. I never made application for duplicate certificate but will do so now.

Q. Where is the Quong Song garden?

A. Near Farmerville, Cal., it closed last year.

Q. Where is the Wing Song garden?

A. Same place, it closed year before last, I never worked there. [57]

Q. Do you know Haw Yo Way? A. No.

Q. Haw Yo Hun? A. No.

Q. Chuey Tong? A. No.

Q. Where is Hom Sick Chew?

A. Don't know such a man.

Q. Chun John told me he worked here. How

about it? A. Never heard of such a man.

Q. Do you know Tom (Hom) Dung Wah?

A. No.

Q. Do you know this photo? (Bun Chew's)

A. Yes, that is Tom Bun. Never heard him called Bun Chew. He worked at the Nom Sing garden, a few years ago and peddled vegetables in Hanford for many years. I have not seen him for two or three years.

Q. Did he work at the Nom Sing garden at the time of the fire?

A. No, Do Wye was the boss of the Nom Sing garden at the time. After the fire, about a month after, the house was rebuilt and Chan Ming, Lee Chew and Fung Ting were murdered at that garden.

Q. Did you ever see Tom Bun in Visalia?

A. No, but I did not go to town very often. Never heard of his being in Visalia. Think he stayed in Hanford all the time.

Q. Did Tom Bun have a brother?

A. I don't know.

Q. Do you know whether he lost his certificate in the fire on the garden?

A. I know nothing about that. [58]

[Statement of Do Wye.]

EXHIBIT "B."

In Re BUN CHEW, Cont'd.

Statement taken at the Nom Sing garden, 2 miles west of Hanford, Cal. 12:30 P. M., March 25, 1914.

Witness, being sworn, testifies:

Q. What are your names?

A. Do Wye, marriage name Do Dock Che.

Q. When and where born?

A. In Chow Chun villiage, Son Suey Dist., China, H. G. 2/12.

Q. What are your parents' names? (Refuses to give family history.)

Q. When did you first come to the U. S.

A. K. S. 14 SS. "Pekin." Visited China, K. S. 32/1, "Mongolia," returning K. S. 32/12, laborer. Registered in San Francisco, and had certificate 67401 and it was burned at this garden S. H. 3/6 (June, 1912). I am now under bond of \$2,500.00 being arrested here last July and taken to Los Angeles.

Q. Who else lost their certificate in that fire?

A. I don't know. Fung Tang, Chan Wing and Lee Jue were murdered at this garden the next year after the fire.

Q. Who worked at the garden at that time, of the fire?

A. The three men who were killed, myself, Quong Quo, who is out on the wagon now, and Fun Lin, now in China.

Q. Do you recognize this (Bun Chew's) photograph?

A. Yes, that is Tom Ben; he used to be in Hanford, but I have not seen him for a number of years. He was a partner on this garden.

Q. How long, how many years since you saw him?
[59]

A. I forget.

Q. Was it two, five or ten years?

A. I think ten years.

Q. Where is he now?

A. I suppose he went to China. I don't know.

Q. Do you know Haw Yo Way?

A. Yes, but I haven't seen him for a long time; I think he is in China.

Q. Do you know Chuey Tong?

A. I have heard about him, but never saw him that I remember.

Q. Do you know Dong Bo?

A. He used to work here.

Q. Do you know Hom Sick Chew?

A. I have heard of him, but don't know where he is.

Q. Do you know whether Hom Sick Chew had a brother? A. No.

Q. Do you know whether or not Tom Ben had a brother? A. I don't know.

Q. How long did you know Tom Ben?

A. He lived here many years. I knew him a long time. He worked on gardens and peddled vegetables around Hanford.

Q. Did he ever live in Visalia?

A. I don't know. [60]

Return on Service of Writ.

United States of America,

Sou. District of Cal.,—ss.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

I hereby certify and return that I served the annexed Writ on the therein-named Chas. T. Connell, Inspector in Charge U. S. Immigration Service L. A. by handing to and leaving a true and correct copy

thereof with Chas. T. Connell personally at Los Angeles in said District on the 13th day of April, A. D. 1915.

C. T. WALTON,
U. S. Marshal.
By D. S. Bassett,
Deputy. [61]

*In the District Court of the United States, in
and for the Southern District of California,
Southern Division.*

In the Matter of Application for a Writ of Habeas
Corpus in Behalf of BUN CHEW.

Writ [of Habeas Corpus].

To CHARLES T. CONNELL, Inspector in Charge,
United States Immigration Service, Los Angeles,
California.

We command you that the body of Bun Chew, in your custody detained, as it is said, together with the day and cause of his detention, you safely have before Benjamin F. Bledsoe, Judge of our District Court of the United States, within and for the District aforesaid, *upon* forthwith, in the courtrooms in the Federal Building, Los Angeles, Los Angeles County, State of California, to do and receive all and singular those things which the said Benjamin F. Bledsoe, Judge of our said District Court, shall then and there consider of him in this behalf, and have you then and there this writ. [62]

WITNESS, the Hon. BENJAMIN F. BLEDSOE, Judge of the District Court of the United States for the Southern District of California, this 13th day

of April, 1915, with the seal of said court affixed, and of our Independence the one hundred and thirty-ninth.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Murray C. White,
Deputy Clerk.

[Endorsed]: Marshal's Criminal Docket No. 6078. No. 962—Crim. In the District Court of the United States in and for the Southern District of California, Southern Division. In the matter of application for a Writ of Habeas Corpus in behalf of Bun Chew. Writ. Filed Apr. 13, 1915, at 6 min. past 3 o'clock P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Frank Stewart, 709-10 International Bank Bldg, Temple and Spring Streets, Los Angeles, Cal. Office Phones: F-2222, Main 7777. Attorney for ———. [63]

[Bond to Appear.]

United States of America,
Southern District of California,—ss.

BE IT REMEMBERED, that on this 23d day of September, in the year of our Lord one thousand nine hundred and fourteen, before me, Charles N. Williams, a United States Commissioner, duly appointed by the District Court of the United States for the Southern District of California to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes pending in the courts of the United States, pursuant to the acts of Congress in that behalf, personally appeared

Bun Chew, as principal and the Illinois Surety Company, a corporation, as sureties, and jointly and severally acknowledged themselves to be indebted to the United States of America in the sum of two thousand five hundred (\$2,500.00) dollars, separately to be levied and made out of their respective goods and chattels, lands and tenements to the use of the said United States.

The condition of the above recognizance is such that, Whereas, the said District Court of the United States having on the 23d day of September, A. D. 1914, granted a writ of habeas corpus unto the said Bun Chew, then and there in the custody of Charles T. Connell, Inspector in Charge of the United States Immigration Service, which said Writ of Habeas Corpus was made returnable before the said District Court on the 25th day of September, 1914, and the Honorable Olin Wellborn, United States District Judge, having made an Order that pending the hearing and final determination of said writ of habeas corpus, the said Bun Chew be admitted to bail in the sum of \$2,500.00,

And Whereas, the said Bun Chew has been required to give recognizance with sureties in the sum of \$2,500.00 for his appearance before the said District court of the United States [64] upon the final decision by said Court upon the said writ of habeas corpus;

NOW, THEREFORE, if the said Bun Chew shall personally appear at the District Court of the United States, for the Southern District of California, to be holden at the court of said Court in the City of Los

Angeles, on the 25th day of September, 1914, and on such day as may be set by the Court for its final decision upon the said writ of habeas corpus, and afterwards whenever or wherever he may be required to appear by order of said District Court and render himself amenable to any and all lawful orders and process in the premises, and not depart the said court without leave first obtained, and if the said writ of habeas corpus be discharged and the said Bun Chew remanded to the custody of the said Charles T. Connell, shall appear for judgment and render himself in accordance with the order of the said District Court, then this recognizance shall be void, otherwise to remain in full effect and virtue.

BUN CHEW. [Seal]

ILLINOIS SURETY CO.,

By F. IRWIN HERRON. [Seal]

Acknowledged before me the day and year first above written.

[Seal]

CHAS. N. WILLIAMS,

United States Commissioner, Southern District of California.

The form of the foregoing bond and the sufficiency of the sureties thereto is hereby approved.

CHAS. N. WILLIAMS,

U. S. Commissioner. [65]

[Endorsed]: No. 853-Crim. U. S. District Co., Southern District of California. In re Application of Bun Chew for writ of habeas corpus. Bond to Appear. Filed Sep. 23, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk [66]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 962—CRIMINAL.

Return.

To the Honorable BENJAMIN F. BLEDSOE,
Judge of the District Court of the United States,
in and for the Southern District of California,
Southern Division.

Sir: In obedience to the writ of habeas corpus issued out of your Honorable Court on the 13th day of April, 1915, in the above-entitled matter, directing Charles T. Connell, Inspector in Charge of the Immigration Service at Los Angeles, California, to have the body of Bun Chew before you with the day and cause of detention on the 13 day of May, 1915, at 9:00 A. M. I, Charles T. Connell, said Inspector in Charge of the Immigration Service at Los Angeles, California, hereby make return as follows:

I.

That I am now, and was at all times in the petition filed herein, and upon which said writ is based, the duly appointed, qualified and acting Inspector in Charge of the Immigration Service, Department of Labor of the United States of America, at Los Angeles, California, and in District No. 23 of the United States Immigration Service, and under the jurisdiction of the Supervising Inspector of said Immigration [67] District, whose headquarters are at El Paso, Texas; that at the time the writ of habeas corpus in the above-entitled matter was served upon

your respondent, the said Bun Chew was in the custody of your respondent in his official capacity as Inspector in Charge of the Immigration Service of said United States.

II.

That said petitioner is a native of China, and entered the United States at or near Douglas, Arizona, on or about the 1st day of January, 1912.

III.

That said petitioner was arrested on a telegraphic warrant of the Secretary of Labor of the United States, dated May 22, 1914, on the charge of being unlawfully within the United States, in that he entered without inspection. That said warrant of arrest commanded F. W. Berkshire, Supervising Inspector at El Paso, Texas, or any Immigrant Inspector in the service of the United States, to arrest the said Bun Chew and bring him before said Inspector for hearing; that the said Bun Chew was duly and regularly taken into custody under and by virtue of said warrant, and thereafter, to wit, on the 22d day of May, 1914, and subsequent days to which said hearing was continued, proceedings were duly and regularly had in the City of Los Angeles, State of California, as required and directed by said warrant by granting said Bun Chew a hearing to enable him, the said Bun Chew, to show cause why he, the said Bun Chew, should not be deported in conformity with law; that at the hearing the said Bun Chew was allowed to inspect the said warrant of arrest and all the evidence upon which it was issued, and was advised of his right to be [68] represented by

counsel, and was, in fact, represented by counsel, to wit, by Frank Stewart, Esquire, and witnesses were produced in behalf of said petitioner and a full opportunity given to show cause why he should not be deported according to law; that a full record of all the proceedings relating to the said charges against the said Bun Chew was made and transmitted in accordance with law to the Secretary of Labor at Washington, D. C., and that thereafter, to wit, on the 26th day of March, 1915, after a full consideration of all the evidence and matters relating to said cause, the said Department of Labor, acting by and through J. B. Densmore, Acting Secretary of Labor, made and issued a warrant for the deportation of the said Bun Chew, a copy of which said warrant, marked exhibit "A," is hereunto attached and made a part of this return, which said warrant was transmitted to the Supervising Inspector of said District No. 23, with instructions to cause said Bun Chew to be taken into custody and to be conveyed by water to San Francisco, California, for deportation, a copy of said letter of instructions being hereto attached and marked exhibit "B," and is hereby referred to and made a part of this return, a copy of which said letter of instructions and said warrant of deportation were forwarded to your respondent by said Supervising Inspector of District No. 23, a copy of the letter transmitting said warrant of deportation being hereto attached and marked exhibit "C" and is hereby referred to and made a part of this return. And your respondent states that at the time of the issuance and service of said writ of [69] habeas cor-

pus upon him, he held the said Bun Chew in custody pursuant to said warrant of deportation, and letters of instruction, for the purpose of executing the command of said warrant.

IV.

Respondent denies that the Secretary of Labor of the United States had no jurisdiction over the person of said Bun Chew, and had no jurisdiction or authority to issue said warrant; denies that said Secretary of Labor exceeded his jurisdiction and authority in and by issuing said warrant of deportation; denies that said warrant is invalid; denies that said petitioner was not given a fair and impartial trial and hearing by the Immigration officers of the United States precedent to the issuing of said warrant of deportation, and alleges the fact to be that said warrant was issued upon evidence produced at a hearing on which the said Bun Chew was given full, complete and fair opportunity to produce in his behalf all the evidence he desired, and that said hearing was in all respects conducted fairly and in good faith and with a view to giving the said Bun Chew every chance to establish his right to remain in the United States, and that the officer conducting the same acted fully and fairly and impartially and in strict compliance with the provisions of Rule 22 of the Immigration Rules of 1911 in regard thereto; denies that the said Bun Chew was ordered deported to China contrary to law, there being no evidence that the said petitioner Bun Chew came from China on the occasion of his last entry into the United States, but on the other hand alleges that said warrant ordering said Bun

Chew deported to China [70] is in accordance with Section 2 of the Act of May 5, 1892.

V.

That respondent does not at this time bring before this Court the body of the said Bun Chew for the reason that respondent at request of Frank Stewart, Esquire, attorney for said petitioner, brought the body of the said petitioner before your Honor in open court on the 23d day of September, 1914, in Criminal proceeding No. 853, pending before said Court, at which time and on motion of said attorney, said petitioner was admitted to bail in the sum of \$2,500.00, which bail was furnished the same day and petitioner was released and is now at liberty on said bond, and this return is made to advise your Honor of the cause and reason for said detention and to do and receive what shall be herein considered concerning the said Bun Chew.

CHAS. T. CONNELL,
Inspector in Charge.

Subscribed and sworn to before me this 12th day of May, A. D. 1915, at Los Angeles, Cal.

[Seal] WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of California.

By R. S. Zimmerman,
Deputy. [71]

EXHIBIT "A."

WARRANT—DEPORTATION OF ALIEN.

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR,

WASHINGTON.

El Paso No. 5025/549.

INC. 9644.

No. 53780/74.

To Samuel W. Backus, Commissioner of Immigration, Angel Island Station, San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector W. A. Brazie, held at Los Angeles, Cal., I have become satisfied that the alien,

BUN CHEW,

who landed near the port of Douglas, Arizona, on or about the 1st day of April, 1912, is subject to be returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese-exclusion laws, in that:

He entered the United States in violation of section 7, Chinese-exclusion act of September 13, 1888, and rule 1, Chinese rules,

And, WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector W. A. Brazie, held at Los Angeles, Cal., I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act ap-

proved March 26, 1910, in that:

He entered in violation of section 36 of said act.
(Rule 13) [72]

I, W. B. WILSON, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to China,—the country whence he came, at the expense of the appropriation “Expenses of Regulating Immigration, 1915.” You are directed to purchase steerage transportation for the alien from San Francisco, Cal., to his home in China, via sailing of the Pacific Mail Steamship Company, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 26th day of March, 1915.

W. B. WILSON,
Secretary of Labor.

EFH. [73]

EXHIBIT “B.”

DIRECTION FOR DELIVERY OF ALIEN FOR
DEPORTATION.

U. S. DEPARTMENT OF LABOR,
Bureau of Immigration.
Washington.

In answering refer to

No. 53780/74.

March 26, 1915.

Supervising Inspector,
Immigration Service,
El Paso, Texas.

Sir:

The Bureau acknowledges the receipt of your let-

ter of March 12th, #5025/549, transmitting record of hearing accorded the alien

BUN CHEW,

who entered near the port of Douglas, Arizona, on or about April 1st, 1912.

After a careful examination of the evidence submitted in this case, the Department is of opinion that the alien is in the United States in violation of law. You are therefore directed to cause him to be taken into custody and conveyed to San Francisco, Cal., via water route, for deportation; the expenses incident to such conveyance, including the employment of an attendant to assist in delivery, if necessary at a nominal compensation of \$1.00 and expenses both ways, being authorized, payable from the appropriation "Expenses of Regulating Immigration, 1915."

Respectfully,

(Signed) A. CAMINETTI,
Commissioner-General. [74]

Approved:

(Sgd.) W. B. WILSON,
Secretary.

Inclose W. D. No. 9644. (Copies—MWB.) [75]

EXHIBIT "C."

U. S. DEPARTMENT OF LABOR,

Immigration Service.

Office of Supervising Inspector.

El Paso, Texas.

In answering refer to
No. 5025/549.

March 30, 1915.

Inspector in Charge,
Immigration Service,
Los Angeles, California.

Referring to your file No. 5528/450, there are forwarded herewith original warrant No. 53780/74, dated March 26, 1915, directing the deportation of Bun Chew to China, and copies of Department letter of the same number and date directing his conveyance by water route to San Francisco for that purpose.

F. W. BERKSHIRE,
Supervising Inspector.

Inc. No. 2050.

[Endorsed]: No. 962-Crim. In the District Court of the United States for the South. Dist. of California, Southern Division. In the Matter of the Application of Bun Chew, for a Writ of Habeas Corpus. Return of Writ of Habeas Corpus. Filed May 13, 1915. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [76]

At a stated term, to wit, the January term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the seventh day of June, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

[Order Denying Writ of Habeas Corpus, etc.]

No. 962—Crim. S. D.

In the Matter of the Petition of BUN CHEW for a Writ of Habeas Corpus.

This cause having heretofore been submitted to the Court for its consideration and decision, the Court, having duly considered the same and being fully advised in the premises, now renders its oral opinion; and it is ordered that the writ of habeas corpus herein be, and the same hereby is, denied, and it is further ordered that the petitioner Bun Chew be remanded to the custody of the Inspector in charge, U. S. Immigration Service. [77]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 962—CRIMINAL.

In the Matter of the Application of BUN CHEW for a Writ of Habeas Corpus.

Stipulation and Order [Staying Execution for 30 Days].

It is hereby stipulated that execution in the above-entitled matter may be stayed for thirty days from and after this 21st day of June, 1915, for the purpose of allowing petitioner time in which to prepare, serve and file his petition for appeal, assignment of errors and bill of exceptions in said matter.

CLYDE R. MOODY,
Assistant United States Attorney.
FRANK STEWART,
Attorney for Petitioner.

On reading and filing the above stipulation, it is hereby ordered that execution be stayed for thirty days from date, for the purposes stated in said stipulation.

Los Angeles, Cal., June 21, 1915.

BLED SOE, JU.
Judge of said Court.

[Endorsed]. No. 962—Criminal. In the District Court of the United States in and for the Southern District of California, Southern Division. In the Matter of the Application of Bun Chew for a Writ of Habeas Corpus. Stipulation and Order. Filed Jun. 21, 1915, at 15 min. past 10 o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [78] Frank Stewart, 709-10 International Bank Bldg., Temple and Spring Streets, Los Angeles, Cal. Office phones, F-2222, Main 7777, Attorney for Petitioner. [79]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

ORIGINAL.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

Petition for Order Allowing Appeal to the Circuit Court of Appeals.

The said Bun Chew, feeling himself aggrieved by the order and judgment entered on June 7th, 1915, in the above-entitled proceeding, by his attorney, Frank Stewart, does hereby appeal from said order to the Circuit Court of Appeals for the Ninth Circuit, and further prays that his appeal may be allowed and a transcript of the record and proceedings and papers, upon which said order was made, duly authenticated, may be sent to the said Circuit Court of Appeals for the Ninth Circuit of the United States of America.

FRANK STEWART,
Attorney for Petitioner.

[Endorsed]: No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the Matter of Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Petition for Order Allowing Appeal to the Circuit Court of Appeals. Received copy of the within Petition this 21 day of July, 1915. Clyde R. Moody, Attorney for —————, Asst. U. S. Atty. Filed Jul. 21, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frank Stewart, 709—

10 International Bank Bldg., Temple and Spring Streets Los Angeles, Cal., Office Phones, F-2222, Main 7777, Attorney for Petitioner. [80]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

ORIGINAL.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

Assignment of Errors.

Now comes Bun Chew, the petitioner herein, by his attorney Frank Stewart, and says that there is manifest error in the record and proceedings herein in this:

1. That the Court erred in holding that the Secretary of Labor of the United States had jurisdiction over the person of the said petitioner.

2. That the Court erred in holding that the said Secretary of Labor had jurisdiction or authority to issue the warrant of deportation against said petitioner.

3. That the Court erred in holding that the said Secretary of Labor did not exceed his jurisdiction or authority in and by issuing said warrant of deportation.

4. That the Court erred in holding that said petitioner was given a fair and impartial trial and hearing by the Immigration officers of the United States, precedent to the issuance of said warrant.

5. That the Court erred in holding that the evidence taken at said trial and hearing was sufficient

to authorize the issuance of said warrant of deportation.

6. That the Court erred in holding that said warrant was not void and invalid.

7. That the Court erred in holding that said petitioner was [81] not lawfully within the United States.

8. That the Court erred in holding that said petitioner was not entitled to the certificate of residence mentioned in his petition.

9. That the Court erred in holding that petitioner should not be deported, if at all, to Mexico.

10. That the Court erred in holding that petitioner should be deported to China.

11. That the Court erred in holding that petitioner should be deported to China instead of Mexico.

12. That the Court erred in holding that there was any evidence before the Immigration officials and the Secretary of Labor of the United States to legally warrant or support the order of deportation herein issued against petitioner.

FRANK STEWART,
Attorney for Petitioner.

[Endorsed]: No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the Matter of Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Assignment of Errors. Filed Jul. 21, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Received copy of the within Assignment of Errors, this 21 day of July, 1915. Clyde R. Moody, Attorney for Asst. U. S. Atty. Frank Stewart,

709-10 International Bank Bldg., Temple and Spring Streets, Los Angeles, Cal., Office Phones, F-2222, Main 7777, Attorney for Petitioner. [82]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

ORIGINAL.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

Order Allowing Petition for Appeal.

On this 21st day of July, 1915, came Bun Chew, by his attorney Frank Sewart, and, having personally filed the same herein did present to this Court his petition for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and presented by him, and praying also that a transcript of the record of the proceedings and papers, upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

NOW, THEREFORE, in consideration thereof, this Court hereby allows the appeal prayed for and orders execution stayed, pending the hearing of said case in said United States Circuit Court of Appeals; and it is further ordered that said Bun Chew may remain at large upon the bond previously given before this Court in this matter, during the pendency of the appeal taken herein from said judgment, provided

said appeal be docketed in the said Circuit Court of Appeals within thirty days from the date hereof and that the said Bun Chew do not depart from the jurisdiction of this Court, but remain and [83] abide by whatever judgment shall finally be entered herein.

Dated July 21, 1915.

BLEDSON, JU.,
Judge.

Due service of the within order allowing appeal and receipt of a copy thereof is hereby admitted this 21 day of July, 1915.

ALBERT SCHOONOVER,
United States District Attorney.
By CLYDE R. MOODY,
Asst. U. S. Attorney.

[Endorsed]: No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the Matter of Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Order Allowing Petition for Appeal. Filed Jul. 21, 1915. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Frank Stewart, 709-10 International Bank Bldg., Temple and Spring Streets, Los Angeles, Cal., Office Phones, F-2222, Main 7777, Attorney for Petitioner. [84]

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

ORIGINAL.

In the Matter of Application for a Writ of Habeas
Corpus in Behalf of BUN CHEW.

Appeal Bond for Costs.

KNOW ALL MEN BY THESE PRESENTS:
That we, Bun Chew, as principal, and Nathan Landsberg, Marcus Landsberg as surety, are hereby firmly bound unto the United States of America in the full and just sum of \$500.00, to be paid to the said United States, for which paymnet well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 21 day of July, 1915.

The condition of the above-entitled bond is such: That whereas the District Court of the United States in and for the Southern District of California, in the above-entitled case on the 7th day of June, 1915, entered an order and decree dismissing said writ of habeas corpus, and the above-named party, as such petitioner, having obtained from said Court an order allowing an appeal from said order and decree to the Circuit Court of Appeals of the United States in and for the Ninth Circuit;

NOW, THEREFORE, if the said Bun Chew shall prosecute said appeal to effect and answer all damages and costs, if he fail to make good his appeal, then the above obligation to be [85] void, otherwise to remain in full force and effect.

(Chinese Characters.)

BUN CHEW.

NATHAN LANDSBERG.

MARCUS LANDSBERG.

The foregoing bond is hereby approved as a cost bond on appeal this 21 day of July, 1915.

BLEDSON, JU.,
Judge.

State of California,
County of Los Angeles,—ss.

Nathan Landsberg and Marcus Landsberg, being first duly sworn, upon their oaths depose and say: That they are the sureties named in the foregoing bond, and that they and each of them are residents and freeholders in the Southern District of the State of California, and are worth the amount specified in said bond over and above all just debts and liabilities, exclusive of property exempt from execution.

NATHAN LANDSBERG.
MARCUS LANDSBERG.

Subscribed and sworn to before me this 21 day of July, 1915.

[Seal] M. M. DONNELLY,
Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the [86] Matter of Application of Bun Chew for a Writ of Habeas Corpus Appeal Bond For Costs. Filed Jul. 21, 1915. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. Frank Stewart, 709-10 International Bank Bldg., Temple and Spring Streets, Los Angeles, Cal., Office Phones, F-2222, Main 7777, Attorney for Petitioner. [87]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

ORIGINAL.

In the Matter of Application for a Writ of Habeas Corpus in Behalf of BUN CHEW.

Praeipice for Preparation of Transcript.

To the Clerk of said Court:

Please make up a transcript on appeal, duly authenticated, in the above-entitled matter to be composed of the following papers:

1. Affidavit and Petition for Writ of Habeas Corpus, with Exhibits "A," "B," "C," and "D" filed in connection therewith and referred to therein (said exhibit "B" being pages 4 to 28, inclusive, of the "Affidavit and Petition" in case No. 853—Criminal, of said Court).

2. Writ of Habeas Corpus.

3. Return and Exhibits therein mentioned.

4. Decision of the Court.

5. Assignment of Errors.

6. Citation issued in the case.

FRANK STEWART,

Attorney for Petitioner and Appellant.

[Endorsed]: Original. No. 962—Crim. In the U. S. District Court, Southern District of California, Southern Division. In the Matter of Application for a Writ of Habeas Corpus in Behalf of Bun Chew. Praeipice for Preparation of Transcript. Filed Jul. 21, 1915, at — min. past — o'clock — M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy.

Frank Stewart, 709-10 International Bank Bldg.,
Temple and Spring Streets, Los Angeles, Cal., Office
Phones, F-2222, Main 7777, Attorney for Petitioner.
[88]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Southern District of California, Southern
Division.*

No. 962—CRIM.

In the Matter of the Application of BUN CHEW for
a Writ of Habeas Corpus.

I, Wm. M. Van Dyke, clerk of the District Court of
the United States of America, in and for the South-
ern District of California, do hereby certify the fore-
going eighty-eight (88) typewritten pages, numbered
from 1 to 88, inclusive, and comprised in one (1) vol-
ume, to be a full, true and correct copy of the Affidavit
and Petition for Writ of Habeas Corpus, exhibits
“A,” “C” and “D,” attached to said Affidavit and
Petition, Stipulation and Order in reincorporation
herein of portion of papers in case No. 853—Criminal,
S. D., Writ of Habeas Corpus, Return to Writ and
attached exhibits, Order Dismissing Writ and Re-
manding Petitioner, Stipulation and Order Staying
Execution of Judgment, Petition for Order Allowing
Appeal, Assignment of Errors, Order Allowing Ap-
peal, Bond on Appeal and Praecipe for Transcript in
the above and therein entitled matter, also, of ex-
hibit “B,” attached to the Affidavit and Petition of

Bun Chew, the Petitioner herein, in case No. 853—Criminal, S. D., and of the Bond for Appearance, given by petitioner herein and filed in said case No. 853—Criminal, S. D., and that the same together constitute the record in this matter, as specified in the aforesaid Praecipe for Transcript filed on behalf of the petitioner and appellant, by his attorney of record. [89]

I do further certify that the cost of the foregoing record is \$38.35, the amount whereof has been paid me by Bun Chew, the petitioner and appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States, in and for the Southern District of California, Southern Division, this 10th day of September, in the year of our Lord, one thousand nine hundred and fifteen, and of our Independence, the one hundred and fortieth.

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
9/10/15. L. S. C.] [90]

[Order Enlarging Appellant's Time to and Including Oct. 1, 1915, to Docket Cause and File Record.]

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

In the Matter of the Application of BUN CHEW for
a Writ of Habeas Corpus.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellant to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is enlarged and extended to and including the 1st day of October, 1915.

Dated at Los Angeles, this 4th day of August, 1915.

BLEDSON, J.,

Judge.

Agreed.

C. R. MOODY,

Asst. U. S. Attorney.

[Endorsed]: No. 2661. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Application of Bun Chew for a Writ of Habeas Corpus. Order Extending Time to File Record. Filed Sep. 7, 1915. F. D. Monckton, Clerk. Refiled Sep. 23, 1915. F. D. Monckton, Clerk.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Bun Chew, Appellant, vs. Charles T. Connell, as Immigration Inspector in Charge, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed September 23, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

2

No. 2661.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Bun Chew,

Appellant,

vs.

Charles T. Connell, as Immigration
Inspector in Charge,

Appellee.

Filed

JAN 24 1916

F. D. Monckton,
Clerk.

BRIEF OF APPELLANT.

FRANK STEWART,
Attorney for Appellant.

J. W. HOWELL,
On the Brief.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Bun Chew,

Appellant,

vs.

**Charles T. Connell, as Immigration
Inspector in Charge,**

Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This is an appeal by Bun Chew from an order of the District Court of the United States for the Southern District of California, dismissing a writ of *habeas corpus* and remanding the petitioner-appellant to the custody of the respondent-appellee, Immigration Inspector in Charge at Los Angeles, California. [Tr. p. 67.]

The petition [Tr. pp. 3-53] for the writ alleged that Bun Chew was a Chinese alien in possession of a Chinese Laborer's Certificate of Residence (No. 39,167), he having registered as such Chinese laborer

at Hanford, California, on February 17, 1894 [Tr. p. 36]; that the said inspector had detained petitioner in custody and was about to deport him to China.

The return [Tr. pp. 58-66] of the respondent to the writ of *habeas corpus* alleged that pursuant to the powers vested in him by the United States immigration laws, he had detained the alien, granted him a hearing and on the record thereof the secretary of labor had ordered deportation to China, on the grounds that Bun Chew had "been found within the United States in violation of the Act of Congress, approved February 20, 1907, as amended by the act approved March 26, 1910, in that he entered in violation of section 36 of said act (rule 13) and that he had entered in violation of section 7, Chinese Exclusion Act of September 13, 1888, and rule 1, Chinese Rules." [Tr. p. 63.]

The District Court dismissed the writ by a minute order. [Tr. p. 67.] Therefore, it must be assumed that the court held, contrary to the contentions of the petitioner, that:

1. That the secretary of labor had jurisdiction over the person of the petitioner.
2. That the secretary of labor did not exceed the jurisdiction and authority given him by law.
3. That the petitioner was given a fair trial and hearing by the immigration officers.

The law under which the hearing was had and the deportation ordered is as follows:

Act of February 20, 1907:

"Sec. 36. That all aliens who shall enter the United States, except at the seaports thereof, or

at such place or places as the secretary of labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act; *provided*, that nothing contained in this section shall affect the power conferred by section 32 of this act upon the commissioner-general of immigration to prescribe rules for the entry and inspection of aliens along the border of Canada and Mexico."

(Rule 26 of the above mentioned rules include Douglas, Arizona, as a port of entry.)

"Sec. 21. That in case the secretary of labor shall be satisfied that an alien has been found within the United States in violation of the act, or that an alien is subject to deportation under the provisions of this act, or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came," etc., etc.

Section 7 (in part), Chinese Exclusion Act of September 13, 1888:

"* * * no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required."

Rule 1, Chinese Rules:

"No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of" * * * (enumerating ports, which do not include Douglas, Arizona).

Briefly summarizing the various statements in the record it would appear that Bun Chew, who is now fifty-one years of age, came to the United States when he was "very young" [Tr. p. 14], having registered at Hanford, California, in 1894 (in compliance with Sec. 6, Act of May 5, 1892, 27 St. at L. 25, as amended by Sec. 1, Act of Nov. 3, 1893, 28 St. at L. 7); that about fifteen years ago he temporarily visited China, re-entering the United States at San Francisco, California [Tr. p. 14]; that early in 1914 he was arrested at Los Angeles, California, charged with being an alien and having entered the United States from Mexico without inspection; that the alien denies ever having left the United States within the last fifteen years and claims that, when apprehended, he was on his return to Visalia, California, from a trip to Phoenix, Arizona.

(For the information of the court it may be well to add that the appellant was released by *habeas corpus* from a previous order of deportation, based on a record identical with the one in the case at bar, except for the certificates appearing on pages 10 and 11 of the transcript. These certificates are intended to identify appellant with the person referred to in the statements of Breton and Garcia, hereinafter discussed. The decision of the lower court in the former case appears in 220 Fed. 387.)

SPECIFICATION OF ERRORS.

The errors, excepted to in the court below, and relied upon by the appellant, are as follows:

1. That the court erred in holding that the Secretary

of Labor of the United States had jurisdiction over the person of the appellant.

2. That the court erred in holding that the Secretary of Labor had jurisdiction or authority to order the deportation of the appellant.

3. That the court erred in holding that the appellant was given a fair trial by the immigration officers before the issuance of said order of deportation.

4. That the court erred in holding that the evidence was sufficient to authorize the deportation of the appellant.

5. That the court erred in holding that the warrant of deportation was not void and invalid.

6. That the court erred in holding that the appellant should be deported, if at all, to China and not to Mexico.

7. That the court erred in holding that there was any evidence before the immigration officers and the Secretary of Labor to legally warrant or support the order of deportation herein issued against the petitioner.

BRIEF OF THE ARGUMENT.

Although the courts will not interfere with the lawful exercise of the discretionary powers granted by statute to the Department of Labor, they will prevent the deportation of an alien, if an abuse of discretion is shown, or if the Secretary of Labor acts in excess of his jurisdiction.

In the case at bar Bun Chew should not be deported for the reasons that:

I. He was not given a fair hearing.

A. There was no evidence before the Secretary of a departure from or a re-entry to the United States.

B. Assuming, but not admitting, that the alien entered, there is no proof that his entry was unlawful.

C. The only elements in the record, that could be construed as evidence of entry, were prepared long before a hearing was granted the alien and consisted only of *ex parte* matter, which, though properly a part of the record, cannot be the only means of proof of a violation of the law.

D. It does not appear from the record that the alien was confronted with and given an opportunity to answer all the statements used against him.

II. From the record it appears that the secretary was without jurisdiction to deport Bun Chew for, if he entered at all, he must have entered the United States more than three years before his deportation was ordered, and more than three years before the petition for his release by *habeas corpus* was filed. Not only must an alien be ordered deported but he must actually be *sent out of the country within three years of the date of his entry*.

Internat. Merc. Co. v. U. S., 192 Fed. 887
(C. C. A.);

U. S. v. Oceanic S. S. Co., 211 Fed. 967
(C. C. A.).

The three-year period being the extent of the Department's jurisdiction, and its forum being one of

limited jurisdiction, the facts conferring jurisdiction must appear on the face of the record.

III. The secretary of labor exceeded his jurisdiction in ordering deportation to China, for, if any foreign residence was shown, the alien's last domicile would be Mexico.

Bun Chew was Not Given a Fair Hearing.

A. THERE WAS NO EVIDENCE BEFORE THE SECRETARY OF LABOR TO AUTHORIZE DEPORTATION.

The necessity for an alien's being granted a fair hearing by the immigration department before his deportation can be ordered by the Secretary of Labor, and the extent of the finality of the Secretary's findings of fact, have been so frequently declared by the courts that citation of authority would be surplusage. We, therefore, merely quote the words of the Circuit Court of Appeals, Eighth Circuit, in *Whitfield v. Hanges*, 222 Fed. 751, as being a statement of the law as generally recognized:

“Whether or not the weight of the evidence in substantial conflict at the hearing sustained the charges against the appellees is a question of fact within the exclusive jurisdiction of the officers of the Department of Labor, and the courts in the absence of fraud and mistake are without jurisdiction to review or reverse the finding there.

“But whether or not there was *any substantial evidence* at the hearing in support of these charges and of the finding of the inspector that they were proved, and of his recommendation that the aliens

be deported, under which the appellees were being deprived of their liberty, is a question of law, the power and duty to determine which are vested in the courts and any injurious error in deciding that question by an executive or quasi-judicial officer or tribunal is reviewable and remediable by them."

The burden of proof is on the department, the appellant being a Chinese laborer and being in possession of a genuine Chinese Laborer's Certificate of Residence, which is *prima facie* evidence of his right to remain in the United States. (Sec. 6, Act May 5, 1882, as amended by Sec. 1, Act Nov. 3, 1893, 28 St. L. 7.) Some act or thing which the law declares to be grounds for deportation must in this case be proven by the inspectors against the alien and that, we contend, was not done. Consequently the hearing was unfair as a matter of law.

"This certificate (Section Six, student's certificate) is the method which the two countries contracted in the treaty should establish a right to admission * * * and certainly it ought to be entitled to some weight in determining the rights of the one thus admitted. While this certificate may be overcome by proper evidence, and may not have the effect of a judicial determination, yet, being made in conformity to the treaty and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported as in this case, because of wrongfully entering the United States upon a fraudulent certificate. In this record we can find no competent testimony which would overcome such legal effect of the

certificate, and the plaintiff in error was therefore wrongfully ordered to be deported.”

Li Hop Fong v. U. S., 52 L. Ed. 888, 209 U. S. 453.

The only features of the record that offer even a hint that appellant might have entered this country from Mexico, or any other place, consist of the two statements appearing at pages 45 and 46 of the transcript, made by two Mexicans, G. Breton and Belisario Garcia, on March 28, 1914, long before the date of the hearing. They are to the effect that Breton and Garcia had at certain times seen in Agua Prieta, Mexico, some Chinaman, a picture of whom marked “Bun Chew” was shown them. These statements are not sworn to but are accompanied by certificates [Tr. pp. 10-11] of an immigration officer stationed at Douglas, Arizona, which say nothing more than that the Mexicans made their respective statements before him and that one of them was interpreted from Spanish into English.

There is absolutely nothing in the record that connects, or purports to connect the photograph, “marked Bun Chew on the back thereof,” with the appellant, that is, nothing outside of the name itself, and the presumption of identity of person from identity of name is hardly a proper one in the case of Chinese, who by reason of their unique system of nomenclature have numerous namesakes. (*In re Bun Chew*, 220 Fed. 387.)

There is nothing to show that the Chinaman, recog-

nized as having been in Agua Prieta, had the name in question. The photograph shown bore that name upon its back, but who put it there, and what the cognomen of the man whose portrait was so exhibited was, is left to conjecture. A photograph of Yuan Shi Kai, the present "president-emperor" of China, marked Bun Chew on the back thereof could be shown to a resident of Pekin, and his statement that he had seen such a person at the capital of China, could as well be used here as proof that the appellant had visited the country of his nativity, as can the statements in the record be fairly used in this case.

The certificates of the inspector at Douglas do not prove that the person seen in Agua Prieta had the name of Bun Chew, or that he was the appellant, for there is absolutely nothing in them to show that Mr. Heath knew either of the Chinamen by sight or by reputation. He says that he is the person before whom the Mexicans made their statements "concerning one Bun Chew" but his words on their face are based on no information and are nothing more than a conclusion.

The photograph attached to the certificate was never identified and the Secretary of Labor had no knowledge of the extent of its resemblance to the petitioner, or if it resembled him at all.

"If the method of examination of the immigrant by the inspector was unfair, then the hearing before the Commissioner and Secretary were also unfair, since they were based upon that examination."

U. S. v. Ruiz, 203 Fed. 443.

B. THERE IS NO EVIDENCE TO SUPPORT THE CHARGE
THAT THE ALIEN ENTERED THE UNITED STATES
WITHOUT INSPECTION.

Granting *arguendo* that the appellant was seen in Mexico and that consequently he must have entered the United States subsequently, there is no evidence that he entered *without inspection*. It was so charged in his warrant of arrest and found in the order of deportation [Tr. pp. 32-33-34-63], but of proof of that fact that is not one jot, although the records at the few border ports of entry could easily have been examined and the question answered beyond doubt by simple letters from the inspectors in charge at said ports. That being a material part of the charge on which the order of deportation is made, there must be some evidence to prove such allegation, or the whole proceeding must fall on account of unfairness and lack of jurisdiction.

C. IMPROPER MATTER WAS USED AS GROUNDS FOR
DEPORTATION.

Another reason why the statements in question should be disregarded is that they were taken long before the time set for the hearing of the charges against the alien. They, as well as the statements of Dong Bow, Do Wye and Chun John [Tr. pp. 48-53], constituted the grounds for the *arrest* of Bun Chew but are not properly a part of the record to be used to order *deportation*. The statements were made in March, 1914 [Tr. pp. 45-51], while the warrant of arrest did not issue until May 22, 1914, and the hearing was not begun until that day.

A case very much in point is *Whitfield v. Hanges*, 222 Fed. 751 (C. C. A.), wherein the only matters that tended to show a violation of the Immigration Act were statements taken before the inspector, prior to the time set for the hearing of the charges. The Circuit Court of Appeals, Eighth Circuit, discussed the value of such matter in the record thoroughly and we respectfully refer this court to that opinion in its entirety.

Portions of this opinion read:

“During the hearing the inspector permitted counsel for the appellees to read the statements he and police officers had drawn from the prostitutes before the arrest was made, but neither he nor the government offered or *introduced these statements in evidence*.

“The information gathered under Sec. 12 (referring to acts of the commerce commission under the Commerce Act), like the information gathered by the inspector before the arrest, may be used as a basis for instituting prosecutions for violations of the law and for many other purposes, but it is not available as such in cases where a party is entitled to a hearing.”

In the recently decided case of *McDonald v. Siu Tak Sam*, 225 Fed. 710, the Circuit Court of Appeals for the Eighth Circuit reaffirms the principles announced in *Whitfield v. Hanges*, *supra*, and discharges the Chinese from custody on the ground that he was not given a fair hearing. The attention of the court is respectfully invited to pages 712-713 (225 Fed.) of

that decision, as being particularly pertinent to the discussion of the case at bar.

In *Choy Gum v. Backus*, 223 Fed. 492, this court used language that might be construed as taking a different view from that expressed in *Whitfield v. Hanges*, *supra*, but the words are not so conclusive as to forbid us to raise the point, for in that case the mere propriety of including in the record *forwarded to the Secretary* evidence adduced prior to the hearing was passed upon. It was not held that deportation could be ordered solely on such evidence and we do not believe that such a rule would be promulgated by this court. If it were, its effect would be that by reason of his arrest an alien would have the burden of proof of his right to be in this country cast upon him and the department would be bound to offer no evidence at all, a situation which was clearly never intended by Congress to exist under the Immigration Act. Such a reversal of the ordinary rule of legal procedure could only exist by reason of a clear and explicit statement to that effect—such as is contained in the Chinese Exclusion Act in cases where a laborer is found without a certificate.

There is nothing in the record that could have shown the Secretary of Labor that the statement of Breton [Tr. p. 46] was ever read or translated (as Bun Chew spoke no English) to him. On pages 15 to 17 of the transcript it appears that the examining officer read various statements, purporting to have been made on previous dates, but the name of Breton is conspicuously absent, and, furthermore, none of the statements

so read were ever identified as being those appended to the application for the warrant of arrest. *Nor were any of them offered in evidence during the hearing.*

The inclusion of matter (for deportation), with which the alien has not been confronted, in the record sent to the Secretary is clearly legal unfairness.

“In the present case if the letter be regarded as evidence used upon the hearing of the charge specified in the warrant, then such hearing was in law an unfair one, because the petitioner was never confronted with it and had no opportunity to controvert the statements which were made therein.”

Ex parte Sati, 215 Fed. 173 (N. Dist. Cal.).

“Fair hearing of the alien’s right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all of the evidence on which the matter is to be decided; it being not enough that the immigration officers meant to be fair.”

Ex parte Petkos, 212 Fed. 275.

In the *Sati* case, *supra*, it was further held that the alien is under no duty to search the records when informed that “he may now see all the matter on which the Secretary acted in issuing the warrant of the arrest.”

It is immaterial in one view, whether or not, as a matter of fact, all of these statements were shown the

alien and he was given an unlimited opportunity to examine and answer them, for the Secretary's power to act depends entirely upon the record before him. If it did not appear from the record that the statements were shown Bun Chew, the hearing would be unfair in the eyes of the Secretary properly viewed, and the issuance of the warrant was then an abuse of discretion.

Before the publication of the opinion of this court in the case of *Healy v. Backus*, 221 Fed. 358, our view of the law led us to believe that, although hearings before executive officers were properly summary and informal, deportation could only be ordered upon a record containing evidence within the usual legal acceptance of the word and that *ex parte* statements were not admissible as means of proof. This court has declared the law to be otherwise, however, on the facts presented in that case and now, contrary to our intention at the time this appeal was taken, we must confine our argument to the point that the rule laid down in *Healy v. Backus* should not justify the deportation of Bun Chew upon the record in this case, even though his hearing might be considered fair and the statements of Breton and Garcia sufficiently explicit to show that he had been in Mexico and had entered the United States contrary to law.

District Judge Wolverton, writing the opinion of this court in the case of *Choy Gum v. Backus*, 223 Fed. 487, says:

“In that case (*Healy v. Backus*) * * * a very wide range of inquiry was indulged in by

which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted * * * and without abuse of discretion on the part of the immigration inspectors, and consequently refused to admit (the aliens) upon *habeas corpus*; *there being pertinent testimony adduced* from which the finding could be reasonably inferred.”

This interpretation is a fair and correct one. There must be some *pertinent testimony*, or other legal evidence, before the officers and it can be supplemented and corroborated in ways not permitted in the courts, that is, the alien cannot be deported, as aimed to be done in this case, solely on hearsay or *ex parte* and unconnected statements. There must be some facts before the Secretary.

This view of the law is consistent with all the authorities, wherein matter, not legal evidence, was considered proper means of proof. In *Healy v. Backus*, *supra*, and in the cases cited in that opinion, the question involved was the prospect of the aliens becoming public charges and the board had some actual proof of that fact before it. As stated in *United States v. Uhl*, 215 Fed. 573, and quoted by this court in 221 Fed. at 365, the board

“*knew* that the aliens were unable to speak any language known in this country and that only one could read or write.”

It must be remembered also that the case at bar is a *deportation* case and not one of *exclusion*. In the latter class of cases hearings are had before certain boards, which themselves order admittance or exclu-

sion of the aliens before them on the evidence before them, while the Secretary deports only on a *report* given him. Therefore, it is more important that the proof submitted to him be real proof, for he has no opportunity of himself judging the appearance of the witnesses or the aliens or of learning intimately the local circumstances.

Moreover the very presence in the record of these two statements betrays unfairness on the part of the inspector and a desire to find some peg on which to hang an order of deportation, in spite of any proof the Chinaman might offer. They were unverified, when they could easily have been sworn to, had the officer desired to require the Mexicans to consider the seriousness of identifying under oath from a photograph a Chinaman, whom admittedly they had not seen for years and then only casually.

Even under the departmental definition of a "fair hearing" these statements should at least have been in the form of affidavits, for subdivision b of rule 35, Rules Relating to Deportation, issued by the Bureau of Immigration, Ed. 13, May 4, 1911, in speaking of an officer's application for a warrant of arrest, says:

"A full statement must be made in every such application of the facts, *supported if practicable by affidavits*, which show the presence in the United States of the alien whose arrest and deportation is sought to be in violation of law."

We realize that the court will not reconsider the weight of the evidence offered before the inspector, but

we further realize that the rule of law that prevents doing so is based on the provisions of a statute and not upon the logic or the sense of justice of the courts. We are not bold enough to ask that the rule be disregarded, but we are frank in saying that the court should welcome any ground which would justify its release of an alien ordered deported on the strength of the *ex parte* statements used here—statements which on their face are indefinite, uncertain, unconnected and untrustworthy and which are made by men who had no sense of the importance of the act done. If Belisarc Garcia for example had realized that he was being instrumental in severing the long established and close ties to this country, which the appellant has by reason of his residence here for almost a lifetime, it is doubtful if he would have troubled himself to inform us that the Chinese of Agua Prieta are so prosperous that “they now have a wagon of their own.”

The Secretary of Labor has No Jurisdiction to Cause the Deportation of Appellant and has Acted in Excess of his Jurisdiction in Issuing the Warrant of Deportation.

The authority granted the Department of Labor to deport an alien on the charge embraced in the present warrant, is strictly limited by statute to a period of three years after entry. Sec. 21 of the Immigration Act of 1907, upon which said warrant is based, is explicit in its terms, as it reads:

“That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that the alien is

subject to deportation * * *, he shall cause such alien *within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came.*"

The warrant of deportation [Tr. p. 8], although not evidence *and not founded on evidence*, states that the alien came into the United States "on or about" April 1, 1912. The petition for a writ of *habeas corpus* was filed April 13, 1915 [Tr. p. 54], or three years and thirteen days later than the last mentioned date.

It is apparent that the immigration officers acted on the belief that the deportation could be made after the expiration of the three years, if the warrant therefor was issued within that time, for the date of the alleged entry was mysteriously found by the secretary—from absolutely no evidence *and in spite of the fact that the findings at the warrant hearing* [Tr. p. 33] *give January 1, 1912, as the date of entry*—to be just four days less than three years from the date of the warrant. Such a belief, however, is not supported by the authorities on the subject, nor by a close reading of the statute. Both the order and the actual deportation must be made within three years.

The Circuit Court of Appeal, second circuit, discusses this point in the case of *International Mercantile Co. v. the United States*, 192 Fed. 887, in a thoroughly comprehensive manner. That case was one brought by the government to recover from a steamship company the cost of deporting certain aliens who had unlawfully landed from one of the defendant's vessels more than three years prior to their presenta-

tion for deportation and the refusal to accept them by the company. Although the action was brought under Sec. 20 of the Immigration Act of Feb. 20, 1907, it and Sec. 21 were construed together, as their wording is practically identical on the question of time.

The court cited the two sections and said in part:

“Congress has said as clearly as the English language can express it, that an alien must be taken into custody *and deported*; that is, taken out of the country, *within three years*. If three years be an insufficient time in which to deport, the argument for additional time should be addressed to Congress and that body may enlarge the time as it has twice done already, increasing it from one year to two years and again to three years. If the words ‘within a reasonable time’ be read into the law, it will be a question of fact in every case, whether the secretary has had reasonable time—and thus a statute intended to be definite and certain will become so indefinite and uncertain that no workable rule can be deduced from its provisions.”

The same court in *U. S. v. Oceanic S. S. Co.*, 211 Fed. 967, in speaking of the same sections of the act, stated:

“Little need be added to our opinion in *International Mercantile Marine Co. v. U. S.* The language of the statute is perfectly clear. The deportation may be made at any time within three years after the alien’s entry into the United States. Such a statute cannot be enlarged by judicial interpretation; there is no room for construction. It cannot be twisted, turned, lengthened or shortened to meet the exigencies of each particular

case. If it is to be effective, all interested persons are to understand that it means what it says. A law of this character must be uniform and precise.

"If exceptions are to be made to the three years period of limitation, Congress should make them and not the courts."

In *Healy v. Backus*, 221 Fed. 358, this court in construing a similar section of the statute, said:

"But if entry has been made and the aliens have become public charges * * *, they may be deported *within three years after entry.*"

Examining the record it appears that the entry, if made at all, must have been made more than three years before the date of the warrant of deportation. As stated before herein, there is no express evidence of when or where the alien entered the United States (if at all) within the last fifteen years. The only things in the record from which the entry and the date thereof could be inferred are the statements "of two more or less distinguished citizens of the Republic of Mexico"—to quote the words of Judge Bledsoe in *ex parte* Bun Chew, 220 Fed. 387 * * *, to-wit, G. Breton and Belisario Garcia [Tr. pp. 45 and 46]. Breton says "to the best of my recollection it has been about two years since I saw this Chinaman the last time;" Garcia says that he saw such a person in Mexico "for about two years and until about three years ago."

Breton (whose statement, as above shown, was never exhibited to appellant) does not say that the last time he saw the Chinaman it was in Mexico and so, going back from the date of Garcia's statement (March 28,

1914), for a period of about three years, it is apparent that the appellant could not have been seen, if ever, in Mexico since March of 1911. Hence, the detention of the appellant was unlawful at the date of his arrest [May 22, 1914, Tr. p. 59] and at the time he sued out the writ of *habeas corpus* (April 13, 1915), and he should have been discharged, the Secretary of Labor having no jurisdiction and having lost all power in the premises by lapse of time.

The forum of the Department of Labor is obviously one of limited jurisdiction, its powers of action being confined to a period of three years after entry, and consequently, in accordance with the rule so often laid down by the federal courts, the facts conferring jurisdiction must be affirmatively proven in the face of the record; that is, an entry within three years must be proven and not left to the guess or conjecture of the Secretary or any of his subordinates.

The forum of the Postmaster-General, wherein he issues fraud orders against certain persons using the mails, is similar to that of the Secretary of Labor, wherein he issues deportation orders against certain aliens, and it has been said by the Supreme Court in the following clear and pertinent language:

“Here it is contended that the Postmaster-General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters or to refuse to permit their delivery to person addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding

arguendo that when a question of fact arises which if found in one way would show a violation of the statutes in question in some particular, the decision of the Postmaster-General that such violation had occurred would be conclusive and final and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the postmaster-general *in any view of the facts*, failed to show a violation of any federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes, would be a pure question of law and not a question of fact. Being a question of law simply and the case stated in the bill being outside of the statutes, the result is simply that the Postmaster-General has ordered the retention of letters directed to the complainants in a case not authorized by those statutes. *To authorize the interference of the Postmaster-General, the facts stated must in some aspect be sufficient to permit him under the statutes to make the order.*"

School of Healing v. McAnnulty, 47 L. Ed. 90.

"The laws and principles upon which our government rests forbid the exercise of arbitrary power. Immigration officers must act within the powers given."

Ex parte Gregory, 210 Fed. 683.

The Supreme Court eloquently says, in *Yick Wo v. Hopkins*, 118 U. S. 226,

"that this is a government of laws, and not of men. And the law is the definition and limitation

of power. * * * For the very idea that one man may be compelled to hold his life, or the means of living, *or any material right* essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails.”

The Secretary Exceeded his Jurisdiction in Ordering Deportation to the Country of Nativity and Not to that of Last Domicile.

By finding that Bun Chew should be deported, the Secretary must have disbelieved all the evidence offered by the appellant and have held only the statements of Breton and Garcia [Tr. pp. 45-46] worthy of credence. If so, he must have believed, as these men stated, that Bun Chew was for about three years a resident of Agua Prieta, Mexico, and engaged in the restaurant business at that place, owning property and being an active member of the business and social community. Such being the case, according to the Department's conclusion, the alien should lawfully have been deported to Mexico, as “the country from whence he came,” and not to China.

The place to which deportation is to be made is governed by sections 20, 21 and 35 of the Immigration Act of 1907. The first two provide for deportation to “the country whence he came,” which in this case would clearly be Mexico. The last above named section provides:

“That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the trans-Pacific or trans-Atlantic ports, from

which said aliens *embarked for the United States*, or if such embarkation was from foreign contiguous territory, to the foreign port at which such aliens *embarked for such territory*.”

Nowhere in the record is there any attempt to prove an embarkation from a foreign port.

Amidon, district judge, in *ex parte* Gyt²¹⁰~~l~~, ~~220~~ Fed. 918, discusses the proper place to which deportation should be made as follows:

“In the great majority of cases the alien comes directly from the country of his nativity, and in case of deportation should be returned there. The Department, as the cases show, has been zealous to make this a universal rule. *That would simplify matters*. But like most universal rules, it will work cruel hardships in individual cases. The general rule under the statute is clearly that the alien shall be deported to the *country whence he came*. This is of course not necessarily the country of his nativity or citizenship. Sec. 35 gives a specific definition of the words ‘whence he came’ *in certain cases*. The first clause of that section deals with the aliens who embark directly for some port of the United States. The second clause applies to aliens who embark for the United States but land at contiguous territory.

“These aliens have kindred and friends in Manitoba; part of them have resided there for a year and six months, and others for six months * * *. To do that (deport them to Austria) would impose upon them a punishment such as civilized countries have heretofore afflicted only for the gravest offenses.

“In my judgment the phrase ‘the country whence he came,’ as used in the Immigration Act, when sections 20, 21 and 35 are construed together, means the country in which the alien *last had his domicile* prior to his unlawful entry into the United States.”

In *United States v. Redfern*, 186 Fed. 604, it is said:

“The immigration laws clearly contemplate the deportation of aliens to the country whence they came, when they illegally entered, *regardless of nativity*. The only exception is when an alien, intending to enter the United States, for the convenience of voyage lands first in foreign territory contiguous to the United States. I do not find that the Secretary of Commerce and Labor has any discretion whatever in the matter, *and any warrant that attempts to exercise such discretion is necessarily illegal and void.*”

And in a case of a similar name, *United States v. Redfern*, 210 Fed. 548, the court found:

“From the return itself, it is evident that the warrant is irregular in that the Assistant Secretary of Labor found that the aliens entered the United States from Canada, yet they are deported to China. *This he is without authority to do.*”

It is true that there are individual cases in the books, notably that of *Frick v. Lewis* (Supreme Court), 58 L. Ed. 967, that appear to lay down the rule that deportation should be made to the country of the alien’s nativity, but it will be noted that in all such cases the alien had entered from some other country wherein he had never established himself and had remained but a

very short time. In the Frick case, *supra*, for example, the alien had never established a domicile in Canada, *having in fact remained there but a few minutes*. Such cases do not bear upon the issues herein, as is pointed out in *ex parte* GytI, quoted above.

If it is true that Bun Chew had three years' residence and business in Mexico, that country was his last place of domicile. We deny that he was ever in Mexico, but our position is that the warrant of deportation is void and illegal and that on the record the Secretary had no authority in law to issue it, directing deportation to China.

"Domicile may be defined as home; a place where a person lives; his only place of residence."

Young v. State, 104 N. W. 808 (Neb.).

"Domicile in its general and popular sense denotes residence and should be treated as synonymous therewith."

Ry. Co. v. McKnight, 99 Tex. 289;

McDonnell v. Shoe Co., 115 S. W. 1028 (Mo.);

Myrick v Myrick, 145 S. W. 146 (Mo.);

Hoslop v. Trafe, 125 N. Y. Supp. 615;

Kelley v. Supervisors, 42 Wis. 107.

In *United States v. Ruiz*, 203 Fed. 441, the Circuit Court of Appeals for the Fifth Circuit held that a native of Spain should be properly deported to Panama, of which country he was a citizen, affirming a decision of the district court, holding

"that the immigration laws contemplated the deportation of an alien who had illegally entered the country to the *country whence he came*, when

he illegally entered the country, *regardless of the country of his nativity*, and released the relator, because the warrant of deportation ordered him returned to Spain, *the country found by the department* to be that of his nativity and citizenship, instead of to Panama, from which country he came to the United States after having been *domiciled* there for a period of many years."

Had Congress intended deportation of contraband aliens to the land of their nativity, how easy and simple it would have been to have so said. The directness and simplicity of determining the now sometimes perplexing question of the proper country of deportation by merely asking, "Where were you *born?*" is at once apparent. In that event the law would direct deportation "to the country of his nativity," and not (as it now exists) "to the country whence he came."

It may be argued that the appellant should be deported to China because he did not claim the right to be deported to Mexico and himself demand that he be so deported. Such contention seems to us unreasonable and unjust. The Immigration Act does not contemplate that the alien shall have any voice in the selection of the country of deportation. The law prescribes exactly the duty of the Secretary to deport to the "country whence he came." The courts have construed that clause to mean the "country of the alien's last domicile." If the Secretary orders deportation inconsistent with the said law, as so construed, he exceeds his jurisdiction and his act is void. The Secretary's acts must be clearly within the law, regardless of the claims of the alien.

Appellant does not claim a right to be deported to Mexico and does not request to be so deported. Indeed, he wishes not to be deported to Mexico; but to what avail are his claims or wishes when a stern legal question is all that is before us? He claims only that the warrant of deportation is void, because the Secretary in issuing it and restraining him thereon, exceeded his legal powers and abused his discretion by illegally ordering deportation to the wrong country under the record before the Department.

In *United States v. Redfern*, 210 Fed. 550, the court discharged Chinese aliens in a case similar to this, because the Secretary ordered them deported to China instead of Canada, from whence, as the record showed, they came. The court said:

“Congress has indeed vested the immigration officers with enormous powers, subject to no check save their own conscience, but in granting them discretion to arrest and deport any person charged with being an alien and unlawfully in the country, I cannot believe that it was ever intended that they could do so arbitrarily and *without some evidence upon which to base their decisions.*”

Where is the evidence that appellant came from China *via* Mexico to the United States? Can he be deported to China without evidence that he came from that country within the last three or four years?

In conclusion we adopt the language of the court in the *habeas corpus* case (wherein the Chinese was discharged), entitled *in re Tam Chung*, 223 Fed. 802:

“Congress had vested him (the Secretary) with vast power, judicial in its nature, capable of infinite abuse and tyranny, little restrained by the Constitution, procedure, publicity, responsibilities and traditions that hedge about a court, and little controlled, save by his honor and conscience; *but it has its limits*, and they have been exceeded here.”

It is respectfully submitted that the judgment be reversed and appellant discharged.

FRANK STEWART,

Attorney for Appellant.

J. W. HOWELL,

On the Brief.

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No. 2661

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

Bun Chew,

Appellant,

vs.

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tion Inspector in Charge.

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Filed

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BRIEF OF APPELLEE

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BRIEF OF APPELLEE.

The statement of facts at the beginning of the brief of appellant is substantially correct, but in order that a full understanding of the case submitted to the Secretary of Labor may be had it is necessary to consider the stipulation entered into by and between the attorney for the appellant and the attorneys for the appellee, which said stipulation is as follows:

“IT IS HEREBY STIPULATED by and between Frank Stewart, attorney for the appellant in the above entitled cause, and Albert Schoonover, United States Attorney, and Clyde R. Moody, Assistant United States attorney, attorneys for the

appellee in the above entitled cause, that the transcript on file in said case, through an oversight, does not contain all of the record which was forwarded to the Secretary of Labor prior to the time of the issuance of the warrant on which the said alien Bun Chew was ordered deported.

“IT IS FURTHER STIPULATED that were all of the record which was so forwarded to the Secretary of Labor prior to the issuance of his order of deportation included within the said transcript, that it would appear that the statements of Beisaria Garcia and Guillermo Breton, set out on pages 45 and 46 of the transcript of record on appeal in this case were both read to the alien and attached to the application to the Secretary of Labor for a warrant of arrest and were made a part of the record by the Inspector in Charge of the examination of said alien, and that the alien Bun Chew himself identified the picture attached to the statements upon pages 10 and 11 of the said transcript as his photograph. The transcript on file, however, is a correct transcript of the record before the Court below on which judgment was entered, but it was not argued before the lower Court that the connection between petitioner and the person referred to in the statements of Garcia and Breton was not made.

FRANK STEWART,
Attorney for Appellant.

ALBERT SCHOONOVER,
United States Attorney.

CLYDE R. MOODY,
Assistant United States Attorney.
Attorney's for Appellee.”

It will readily be seen that the stipulation answers several points contended for by counsel for appellant in his brief, but these matters will be more particularly called to the attention of the Court hereafter. We will take up the points put forward by counsel for appellant in the order in which he has argued them in his brief.

I.

(A) The first point counsel for appellant argues in his brief is that the alien Bun Chew was not given a fair hearing before the Immigration Department at Los Angeles. There can be no doubt about the necessity of a fair hearing, and in the event that the alien was not given a fair hearing, the proper procedure is by petition for writ of habeas corpus; but in this case we are firmly of the opinion that every right of the alien was safeguarded and that his hearing was fair in every particular. A writ of habeas corpus cannot be used as a writ of error, as has well been said in the case of *Sibray vs. United States*, 227 Fed. 1, and the jurisdiction under the writ is confined to an examination of the record with a view to determining whether the person restrained of his liberty is detained without authority of law. Therefore, all that is necessary for the appellee to show in this case is that the alien Bun Chew is held under legal authority and that he was given a fair hearing.

It is argued by counsel for appellant that the burden of proof is on the Department of Labor, the appellant being a Chinese laborer and being in possession of a genuine Chinese Laborer's Certificate of Residence,

which is prima facie evidence of his right to remain in the United States. It is admitted that Bun Chew had a Chinese Laborer's Certificate of Residence, and it is also admitted that the Government must in some way overcome the efficacy of such certificate of residence. The statements set out on pages 45 and 46 of the transcript show that the alien Bun Chew was in Mexico about the 1st day of April, 1912, and prior thereto, and the fact that he was arrested in the United States shows that he subsequently entered the United States, for he could not now be here without effecting an entry. Section 7 of the Act of 1888, being an amendment to the Chinese Exclusion Law, provides the manner in which a laborer in the United States, wishing to depart therefrom, may legally provide for his re-entry into the United States. In the case at bar the Secretary of Labor found that Bun Chew had been out of the United States, and being arrested within the United States the burden of proof then rested with the alien to show that his re-entry into the United States was legal. The alien strenuously denies that he was ever in Mexico (Tr. 15). It is logical to suppose that if his entry from Mexico, was legal he would not have denied his presence in Mexico, and it is prima facie evidence of his fraudulent entry into the United States when he is shown to have been in Mexico and he refuses to give any information about his entry into the United States. Counsel for appellant argues that the Government could easily have shown whether or not this man was duly admitted by an Immigrant Inspector.

This it was not incumbent upon the Government to do and would have been an almost impossible task in any event, as the records of every port of entry in the United States would have to have been presented in evidence at the hearing, and it was to obviate just such procedure as this that Congress made it incumbent upon a Chinese laborer in the United States to establish his right to be and remain here.

The stipulation recited above fully answers the contention of counsel for appellant on page 11 of his brief, that there was no connection established between the photograph marked "Bun Chew" on the back thereof, mentioned in the certificates on pages 10 and 11 of the transcript, and the alien; therefore it is not necessary to argue this point.

The case cited on page 11 of the brief of counsel for appellant, to-wit, *Liu Hop Fong v. United States*, 209 U. S. 453, is not a parallel case with the one at bar, in that that was a case where a person of the exempt class was landed in the United States, and his landing being prima facie evidence of his right to be in the United States, if he were to be deported it devolved upon the prosecution to prove that his landing was fraudulent; and no presumption arose against him in that he belonged to the exempt class, whereas in the present case the defendant does not belong to the exempt class, but belongs to the excluded class, to-wit, the laboring class; and when it is shown that he has departed from the United States and subsequently re-entered, it then becomes his duty to show that his entry was legal.

(B) Under this sub-division in the brief of counsel for appellant, counsel reiterates a portion of his argument under the preceding subdivision. The argument of counsel here simply begs the question. The alien can not be in a position to affirm that his last entry into the United States was lawful when he denies that he was out of the United States; and it now having been shown that he was out of the United States he cannot be heard to say that it devolves upon the Government to prove that he was not legally re-entered into the United States. As we have stated above, our position under Section 7 of the Act of 1888 is that the certificate of residence which this alien presented lost its efficacy when he was shown to have been in Mexico on or about the 1st day of April, 1912; and that then in order that his certificate of residence should avail him of his contended right he must show that his last entry into the United States was legal,—in other words, the burden is shifted from the appellee to the alien when the appellee shows that the alien was in Mexico on or about the 1st day of April, 1912.

(C) Under this sub-division counsel for appellant alleges that improper matter was used as grounds for deportation, in that the statements of Garcia and Breton (Tr. 45 and 46), as well as the statements of Dong Bow, Do Wye and Chun John (Tr. 48, 53) were made prior to the arrest of the alien and prior to his hearing. This question is discussed at length by this Court in the case of Choy Gum v. Backus, 223 Fed. 487 (493) in which the Court says:

“This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officers had been guilty of no abuse of discretion reposed in them. Such a case was *Healy v. Backus*, 221 Fed. 358. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred.”

In the case at bar, by the stipulation above recited, it appears that the statements of Garcia and Breton were both read to the alien, and the statements of Dong Bow, Do Wye and Chun John appear in the record after the attorney for the alien was admitted to the hearing, and on page 18 of the transcript it appears that the complete record in the case, so far as it had at that time proceeded, was handed to the attorney for the alien, whereupon he requested a con-

tinuance for the purpose of producing witnesses, which continuance was granted him, and the testimony of witnesses produced on behalf of the alien follows on page 19 et seq of the transcript. No advantage was taken of the alien, and he was given every opportunity to examine all the statements presented in evidence, or upon which the Immigration Department relied, and which were presented to the Secretary of Labor, and upon which the Secretary based his warrant of deportation. This is an analagous situation to that discussed in *Sibray v. United States*, 227 Fed. 7, in which case the court came to the conclusion that the alien had a fair hearing. Counsel cites the case of *Whitfield v. Hanges*, 222 Fed. 745 (751); but a close reading of that case distinguishes it from the present case, in that in that case the aliens were refused the right to present witnesses to rebut the contents of the statements used against them, and also in that case the statements forwarded to the Secretary of Labor were not introduced in evidence, but in this case not only are the statements a part of the record but those that appeared in the record before counsel was retained by the alien were translated and explained to the alien, as appears by the stipulation above recited. In the case of *McDonald v. Siu Tak Sam*, 225 Fed. 710, cited by counsel for appellant, it was held that the alien was not given a fair hearing in that the statements used against him were not shown to him and he was not cognizant of the contents, consequently had no opportunity to meet the allegations therein contained. Furthermore, that case is decided

on the facts and it was decided that there was no evidence against the alien to warrant his deportation, even if the statements were admitted against him. The contention of counsel for appellant, at the bottom of page 15 of his brief, is covered by the stipulation hereinabove cited, and it appearing that the statements were brought to the attention of the alien directly, and that they were handed his counsel and his counsel given opportunity to examine them and to produce evidence to refute them, the Secretary's power to act upon them and to issue his warrant of deportation cannot be questioned. That the testimony was pertinent goes without saying, in that it was direct proof, if accepted, that the alien had been in Mexico on or about the 1st day of April, 1912. The complaint of counsel that the statements on pages 45 and 46 of the transcript were unverified is without weight, in that an immigration officer is not authorized to administer an oath under the conditions that those statements were taken.

Whitfield v. Hanges, 222 Fed. 749, 750;

Act of Feb. 20, 1907, p. 1124, Par. 24, 34 Stat. 906;

McDonald v. Siu Tak Sam, 225 Fed. 713;

and a reading of the rule cited by counsel on page 19 of his brief, together with the decisions in the cases of Choy Gum v. Backus, 223 Fed. 492, and Healy v. Backus, 221 Fed. 358, abundantly discloses that evidence used by the Immigration Inspector in his warrant hearing does not necessarily have to be in the form of affidavits, but may be even letters.

The criterion of a fair hearing by an Immigration Inspector is (1) did the alien have an opportunity to meet all of the evidence used against him, and (2) was there any evidence upon which the warrant for deportation might rest; and from the above discussion it appears that both of these questions must be answered in the affirmative.

II.

(A) On page 20 et seq of the brief of counsel for appellant he contends that the Secretary has no jurisdiction to cause the deportation of appellant and has acted in excess of his jurisdiction in issuing the warrant of deportation, in that the alien was not actually deported within three years after landing or entry into the United States; whereupon he proceeds with some ingenuity to show that the warrant of deportation was actually dated more than three years from the entry of the alien into the United States from Mexico. The statement of Garcia, set out on page 45 of the transcript, states that he saw the Chinaman in Mexico, whose photograph marked Bun Chew was exhibited to him by Frank W. Heath, for a period of about two years, and until about three years ago. This establishes the fact that the alien Bun Chew was in Mexico. The statement of Breton, set out on pages 46 and 47 of the transcript, states that he saw the Chinaman in Mexico whose photograph was marked Bun Chew, and which photograph was shown him by Frank W. Heath, and that he frequented a Chinese restaurant at Agua Prieta. Now Breton states

that he is a citizen of Mexico, but has resided in Douglas, Arizona, continuously during the past 18 months, and that previous to his residence in Douglas, Arizona, he lived at Nacozari, Sonora, Mexico, for about seven years; at the conclusion of his statement he remarks that it has been about two years since he last saw this Chinaman. Taking his statement as a whole, therefore, it must be that the last time he saw the Chinaman was in Mexico, for he was in the United States for a period of only 18 months prior to his statement, all of the rest of the time being in Mexico, and if he saw the Chinaman two years before his statement it must have been in Mexico. Therefore, giving the statement of Breton the only logical interpretation that it can have, it means that he saw Bun Chew in Mexico about two years before his statement. His statement is dated the 30th day of March, 1914; therefore the time when he saw Bun Chew in Mexico would be about the 1st day of April, 1912, as set out in the warrant of deportation (Tr. 8). The warrant of arrest was dated May 22, 1914, and deportation ordered March 26, 1915. It will therefore be perceived that the warrant of arrest was dated almost an entire year prior to the time action against the alien Bun Chew under the Immigration laws would be barred by the statute of limitations, and the actual warrant of deportation was within the three years within which the Department of Immigration must act to remove aliens unlawfully within the country. Counsel cites the case of the International Mercantile Marine Co. vs. United States, 192 Fed. 887, and the

case of the United States vs. Oceanic Steam Navigation Co., 211 Fed. 967, to show that not only must the arrest of the alien be within three years from his entry into the country, but that his actual deportation must be effected before the expiration of three years from his entry. A glance at both of these cases will readily disclose that they are civil actions, and the findings of the court in these cases were to the effect that the steamship companies would not be obliged to pay for the expenses of deportation of aliens unless such deportation were actually effected within three years from the entry of the alien into the United States. However, we do not so interpret it, and we do not believe it to be the law, that the Immigration Department must not only cause the arrest of an alien, but his actual deportation within three years of his entry. The law under which the Immigration Department proceeds to deport aliens bears a close analogy to criminal laws under which a prosecution for a felony must be undertaken within three years from the date of the actual commission of the crime. In no case does a person have to be not only prosecuted, but actually convicted within three years of the commission of the crime; but it is sufficient if an action be commenced within three years and we are constrained to believe that that is the interpretation which Congress intended should be placed upon this law in question, namely, that a warrant of arrest must issue within three years from the date of entry of the alien into the United States, but that it is not necessary that his actual deportation

be effected within three years.

Judge Foster, in the case of *United States vs. Redfern*, 180 Fed. 506, holds as follows:

“It is urged with great earnestness by counsel for relator that as it was physically impossible to deport him (the alien) from the United States within three years from the time he entered, when he was surrendered by his bondsmen, that he cannot be deported at all, as the law should be held to be that an alien must be both arrested and deported within three years. I cannot agree with this view. I consider the Government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the Government is entitled to a reasonable time in which to carry out the sentence of deportation.”

and the same view is entertained in 186 Fed. 669, where the court quotes from the above opinion.

III.

The last point contended for by counsel for appellant is that the Secretary exceeded his jurisdiction in ordering deportation to the country of nativity and not to that of his alleged last domicile. He argues that if the Secretary found that Bun Chew had been in Mexico he must necessarily have also found that he was a resident of Mexico, and being such resident of Mexico if he was to be ordered deported, should be ordered deported to Mexico as the country from whence he came. As he has said, the place to which deportation is to be made is governed by Sections

20, 21 and 35 of the Immigration Act of 1907, Section 35 reading "that the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which said aliens embarked for such territory."

Counsel recites that there is nowhere in the record any attempt to prove an embarkation from a foreign port to the United States through Mexico, and therefore it could not be held that there was any such embarkation for the United States through Mexico. The case of *ex parte Gytel*, 210 Fed. 918, cited by counsel, can hardly be relied upon as a ruling case, as in that case the aliens embarked from a foreign country for Canada and were peacefully engaged in laboring in the Dominion of Canada, when they were approached by an individual who offered them work, and to whom they hired themselves. This individual thereupon transported them to the United States without their knowledge and without their consent, where he placed them at work. The court found that they were in the United States without their consent and without their knowledge, and therefore ordered them deported to Canada, and quite right under the findings of the court.

In the case of *United States vs. Redfern*, 210 Fed. 548, the Court found that the Chinaman had been in the country more than three years and thus could not

be deported under the Immigration Act, and the court further found that "there was nothing to show that they came from Canada at all," and the statement quoted by counsel for appellant, "from the return itself, it is evident that the warrant is irregular, in that the Assistant Secretary of Labor found that the aliens entered the United States from Canada, yet they are ordered deported to China. This he was without authority to do," is nothing more or less than dictum, as the case was reversed upon another point; and furthermore, such a statement is directly contrary to the rule laid down by the Supreme Court in the case *Frick vs. Lewis*, 233 U. S. 91, in which case the Supreme Court held that a person having been a residence of this country for more than three years and going abroad for a temporary purpose and re-entering the United States unlawfully should be deported, not to the country from which he directly re-entered the United States, but to the country from which he originally came; in other words, to the trans-Atlantic port from which he first embarked. In the case at bar there is nothing to show that the sojourn of Bun Chew in Mexico was anything other than a temporary one, and that he intended to return to the United States when he went to Mexico, and his intention is best illustrated by the fact that he did re-enter the United States and is now seeking to establish his right to remain here. We have carefully examined the cases cited by counsel for appellant in his brief bearing on this point, and find none in which a party was deported to the country other than that

of his nativity, unless it affirmatively appeared that he was a subject or citizen of another country. In this case Bun Chew admits that he is a native of China and a subject of China. He sets up no claim to being subject to the laws of Mexico, but on the contrary says that he is a subject of China (Tr. 14), and in the absence of any affirmative proof on his part of his right to be deported to Mexico or his citizenship in Mexico, the Secretary was right in finding that he should be deported to China. Of course we recognize the fact that this alien is being deported under the Immigration law, and not under the Chinese Exclusion law, but the procedure under the Chinese Exclusion law might throw some light on the procedure to be followed in this case, and under the Chinese Exclusion law it is incumbent upon the alien to affirmatively show his right to be deported to some country other than China. Sec. 2, Act of May 5, 1892, 27 Stat. 25.

The case of *Lee Sim vs. United States*, 218 Fed. 432, is in many respects a case similar to the one before us, and in that case the court held that the alien should not be deported to Canada, but should be returned to the country whence he came, to-wit, China. We do not believe that the appellant can now be heard to set up the claim that if he is to be deported at all, he should be deported to Mexico simply because the evidence shows he was in Mexico at one time.

Therefore, having fully answered all of the arguments advanced by counsel for appellant, and no rea-

son appearing why the order of the lower court refusing to discharge the alien upon the writ of habeas corpus should not be sustained, we respectfully submit that the order of the lower court should be affirmed.

ALBERT SCHOONOVER,

United States Attorney.

CLYDE R. MOODY,

Assistant United States Attorney.

Attorneys for Appellee.

No. 2661.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Bun Chew,

Appellant,

vs.

Charles T. Connell, as Immigra-
tion Inspector in Charge,

Appellee.

PETITION OF APPELLANT FOR A REHEARING.

FRANK STEWART,
J. W. HOWELL,
Attorneys for Appellant.

MAY 27 1916

F. D. Macdonald,

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*To the Justices of the United States Circuit Court of
Appeals for the Ninth Circuit:*

The question of the limitation of the authority of the Secretary of Labor to deport under the Immigration Act being one of such vast importance, the appellant in the action named above hereby takes the liberty of respectfully asking the court to grant a rehearing in the matter and to reconsider some of the points of law involved.

We believe that the majority of the court in its opinion filed herein, in which the decision of the lower court was affirmed, erred in its statement of a very material legal doctrine.

THERE IS NO ANALOGY BETWEEN STATUTES OF LIMITATIONS IN CRIMINAL ACTIONS AND THE PROVISIONS IN QUESTION OF THE IMMIGRATION ACT.

The majority of the court adopted a view suggested by the attorney for the United States in his brief and said "the statute should be construed in analogy with statutes of limitation in criminal cases, the requirement of which is answered if prosecution is begun within the time limited." (Opinion filed May 1, 1916.)

No citation of authority was given to support this holding, nor is there any offered by the government in its brief. It is taken for granted that such an analogy exists, but an examination of the law will show a wide distinction between limitations of criminal actions and the restriction of the authority of the Secretary of Labor.

The Immigration Act, it will be remembered, provides that the secretary

"shall cause such alien within a period of three years after landing or entry therein *to be taken into custody and returned to the country whence he came.*" (Sec. 21, Act of Feb. 20, 1907.)

To create the analogy suggested by the court we would have to find that the various statutes affecting the time in which criminals can be prosecuted read something like this:

Criminal actions may be prosecuted and sentences executed within (say) three years after the commission of the act complained of.

Further than that, in order to justify the United States' attorney's statement and the court's holding,

we would have to find that the various courts had interpreted statutes similar to the supposititious one just given to mean that the mere institution of an action within the statutory period was sufficient compliance with the demand of the law.

But such is not the case. The courts have held that the commencement of an action during the time limit is all that is necessary, *because that is just what every law, which limits criminal prosecutions in the Union, says.*

The following are excerpts from the laws of all states wherein prosecutions are limited in point of time, only enough of each statute being given to show its relation to the point now argued:

“* * * unless an indictment is found, or the information is instituted within three years.”

U. S. Rev. St., #1043.

“An indictment must be found or an information filed within three years * * *”

#800, California Penal Code.

“The prosecution of * * * must be commenced within * * *”

#7345, Code of Alabama.

“An indictment must be found for * * *, or an information filed within * * *”

#827, Penal Code of Arizona.

“* * * unless an indictment be found or prosecution instituted within * * *”

#2106, Code of Arkansas.

“* * * unless an indictment be found or unless the information or the complaint for the same shall have been filed within * * *”

#2076, Code of Colorado.

“No person shall be prosecuted * * *, except within five years, etc.”

#1578, Code of Connecticut.

“* * * an indictment shall be made and presented within one year * * *”

Sec. 1, Chap. 83, Laws of Florida.

“An indictment must be found within * * *”

#7501, Code of Idaho.

“An indictment may be found within * * *”

#313, Dov. IV, Chap. 38, Laws of Illinois.

“* * * unless an indictment be found within * * *”

#1331, Code of Indian Territory.

“An indictment must be found within * * *”

#5164, Code of Iowa.

“Prosecutions must be commenced within * * *”

#5918, Code of Kansas;

#1138, Code of Kentucky.

“No indictment shall be found after * * *”

Sec. 15, Chap. 132, Laws of Maine.

“No prosecution or suit shall be commenced unless within * * *”

#11, Art. LVII, Laws of Maryland.

“All * * * indictments shall be found and filed within * * *”

Sec. 25, Chap. 213, Laws of Massachusetts;
#15063, Howell's Michigan Statutes.

“An indictment cannot be found except * * * within * * *”

#6744, Statutes of Minnesota.

“A person shall not be prosecuted for any offense, unless the prosecution commence within * * *”

#1414, Code of Mississippi of 1906.

“* * * unless an indictment be found or information filed within * * *”

#4945, Rev. St. Missouri.

“* * * an indictment for * * * must be found or information filed within * * *”

#1581, Crim. Code of Montana.

“* * * unless the indictment, information or action for the same shall be found or instituted within * * *”

#8910, Rev. St. Nebraska.

“Indictments or informations for offenses shall be found or instituted within * * *”

Sec. 14, Chap. 253, Rev. St. New Hampshire.

“* * * unless an indictment be found or information filed therefore as hereinafter limited * * *”

#3368, New Mexico Statutes.

“That all actions or informations shall be brought or exhibited within * * *”

Sec. 21, Comp. Sts. of New Jersey.

“An indictment must be found within * * *”

#142, Code of Crim. Proc. of New York.

“* * * shall be presented and found by the grand jury within * * *”

#3147, Revisal of 1905, Laws of North Carolina.

“An information must be filed or an indictment found within * * *”

#9685, Code of Crim. Proc., Rev. Codes of North Dakota.

“* * * on complaint made within * * * thereafter * * * shall be fined and imprisoned * * *”

#13044, P. & A., Ohio General Laws.

“* * * prosecution must be commenced within * * *”

#1376, Oregon Laws.

“* * * unless an indictment be found against him therefore within * * *”

Sec. 33, Chap. 354, Gen. Laws of Rhode Island.

“An indictment or information shall be filed within * * *”

#86, Chap. 2, Comp. Laws South Dakota.

“* * * prosecution must be commenced within * * *”

#5625, Rev. Laws of Oklahoma.

“Prosecutions * * * shall be commenced within * * *”

#5810, Code of Tennessee.

“An indictment may be presented within * * *”

Art. 216, Well’s Texas Crim. Stats.

“An indictment must be found or information filed within * * *”

#4599, Comp. Laws of Utah.

“Actions, complaints, informations or indictment * * * shall be commenced within * * *”

#2347, Pub. Stats. Vermont.

“An indictment or information must be found or filed within * * *”

#4629, Wisconsin Stats.

(With the means of search available no statutes of limitations were found for Delaware, Georgia, Hawaii, Indiana, Louisiana and South Carolina.)

It must therefore be admitted that the legislative intent as signified by the wording of the various statutes given above was different from that of Congress when the Immigration Act was passed. In all these laws it is obvious that the commencement of an action should toll the statutes, for that is precisely what each and every one of them says. None of them are analogous to Sec. 21 of the Act of Feb. 20, 1907.

Further than this, such statutes of limitations are not loosely construed as intimated by the court in its

opinion. It may not “seem reasonable to suppose that Congress intended that before ordering the arrest of an alien believed to be unlawfully in the country the secretary must take into account the probable time that must ensue between the arrest and the warrant of deportation, and compute the time of all possible delays to be caused by appeals or writs of *habeas corpus*,” as said in the majority opinion, but the rule of reason should have been applied by Congress before the act became a law. In the case at bar the alien took no action which would have interfered with the lawful exercise of the secretary’s power. The three years ran before his petition for a writ of *habeas corpus* was filed. But even if they had not, the power of the secretary would have lapsed. As the Supreme Court says in *M’Civer v. Regan*, 4 L. Ed. 179, in construing a civil statute:

“If this difficulty be produced by the legislative power, the same power might provide a remedy; but courts cannot, on that account, insert in the statute of limitations an exception which the statute does not contain. It has never been determined that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, *though created by the legislature*, shall take such case out of the operation of the statute of limitations, unless the legislature has so declared its will.”

It may be that Congress has realized its “error” for the Immigration Act now before Congress increases the term of the secretary’s autocratic power to five years.

The state courts have interpreted their statutes in a light favorable to the accused, and have held that the letter of the law must be complied with.

“Under Crim. Code #256, which provides that the indictment for an offense must be found within three years next after the offense was committed, the running of the statute is not arrested by the filing of a complaint before a magistrate and causing the accused to be arrested and bound over to the District Court.”

State v. Robertson, 75 N. W. 37 (Neb.).

“To ‘commence’ a criminal action to prevent the statute of limitations from running there must not only be a complaint on oath, but a warrant of arrest must be signed and placed in the hands of the officer for service.”

People v. Clement, 40 N. W. 190 (Mich.).

“The finding of an informal presentment is not the finding or institution of an indictment, so as to take the case out of the Act of April 30, 1790, limiting the prosecution of certain offenses to two years.”

U. S. v. Slacum, Fed. Cas. No. 16311, 1 Cranch. 485.

There is a very great deal of case law to the same effect, but we have found none that could substantiate the statement of the attorneys for the United States in their brief. Consequently, it must appear that the majority of the court's holding cannot be sustained on any inference drawn from the construction of criminal statutes of limitation. If an analogy is to be made—and we are anxious that one should be—the true con-

clusion is that Congress meant exactly what it said, viz., that the alien should be taken into custody and deported within three years after entry.

OUR CONTENTION THAT THERE WAS NO EVIDENCE TO AUTHORIZE DEPORTATION DID NOT REST SOLELY UPON THE PROPOSITION THAT THE APPELLANT WAS IN POSSESSION OF A CERTIFICATE OF RESIDENCE.

In its opinion the majority of the court stated that it was "shown by the evidence that the appellant had left the United States and gone to Mexico," but no comment was made on the proof of that fact, which we had attacked very earnestly in our brief. From this we feel that it is possible that the court misconstrued the stipulation filed by the attorneys herein, which is presented in full in the government's brief, as an agreement waiving the point of the sufficiency of the evidence. The stipulation was, however, only to the effect that the statements of Breton and Garcia [pages 45 and 46 of the transcript]

"were read to the alien * * * and that the alien Bun Chew, himself, identified the pictures attached to the statements upon pages 10 and 11 of the transcript as his photograph."

The stipulation did not affect the question of the power of the secretary to deport on nothing more than two unverified statements, such as were used in this case, when supported by nothing else, and, as such statements have been used in other cases and undoubtedly will be brought into use again, it is of great im-

portance, both to the government and the bar, that an expression of the opinion of this court on the question be obtained as soon as possible. This is especially true now, inasmuch as the lower court in this case expressly held such proof sufficient while Judge Dooling of the Northern District of California in a very recent case decided to the contrary, saying:

“I have had occasion to hold before this that the fact which gives jurisdiction to the immigration officers to hear and determine these matters—that is, entry into the United States within three years—cannot be established by *ex parte* statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years, the only tribunals that can order the deportation of a Chinese laborer are the commissioners and the courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the *ex parte* statement of a resident of a foreign country who is never produced before him.”

Ex parte Tom Yuen, 230 Fed. 656.

It is to be noted that Judge Dooling emphasizes the fact that the proceeding is brought under the Immigration Act and not under the Chinese Exclusion Act, which expressly puts the burden of proof on a Chinaman charged with being unlawfully within this country. In the case at bar likewise only a violation of the Immigration Act is charged in the warrant of arrest and the application for warrant [page 34 of transcript], and for that reason Bun Chew is to be

considered only as an alien—just as an Englishman or a Frenchman might be—and not as a Chinaman. In view of this we believe that, owing to our failure to emphasize the point in our brief (although it is admitted on page 18 of the United States' attorneys brief), this court did not realize that deportation was sought here solely under the Immigration Act. Otherwise, we are sure it would not have said

“the burden rests upon the alien to show that his entry was legal, *since the burden is always upon him to show his right to be and remain in the United States,*”

for such *dictum* is contrary to previous expressions of this court, when interpreting the immigration law. The department has always been compelled to prove its charges by some evidence.

In fact Bun Chew could not be deported in a proceeding such as this for a violation of the Chinese Exclusion Law. The immigration officers have no authority to enforce its provisions, as has been clearly, logically and convincingly shown in *Ex parte Woo Jan*. 228 Fed. 928.

In that case the court analyzes all present and past statutes affecting immigration and Chinese exclusion and arrives at the unanswerable conclusion that the Chinese are entitled to a judicial hearing before a commissioner or court, when charged with not being properly in this country by virtue of the laws regulating the admission and residence of their people. This entire opinion, which has been followed in *U. S. v. Prentiss*, 230 Fed. 935, is respectfully called to the court's attention.

For the foregoing reasons, namely:

1. That if Sec. 21 of the Act approved Feb. 20, 1907, is to be construed in analogy with criminal statutes of limitation, the conclusion reached by the majority of this court is clearly erroneous, and

2. That the court was apparently misinformed as to the law claimed to have been violated by the alien, we respectfully ask that a rehearing be granted and the case be reconsidered on the grounds herein specified, or that the questions of law be certified to the Supreme Court.

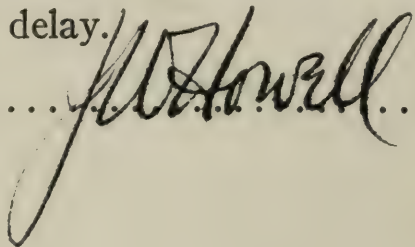
FRANK STEWART,

J. W. HOWELL,

Attorneys for Appellant.

CERTIFICATE.

J. W. Howell hereby certifies that he is one of the attorneys for the appellant in the above mentioned matter; that in his judgment the foregoing petition for a rehearing is well founded and that it is not interposed for the purpose of delay.

..........

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. M. NELSON,

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vs.

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JOHNSON, CHAS. NELSON, A. SAND-
STRAN, M. W. JOHNSON, PETER
JOHNSON, HUGO DUNDGREN, HARRY
SWANSON, N. P. JOHNSON, GUST.
PETERSON, CHARLES JOHNSON,
JOHN ANDERSON, KNUT ANDERSON,
A. PETERSON, ALBERT JOHNSON,
CARL ANDERSSON, M. NILSSON,
JOSEF NILSEN, JOHAN KARLSEN,
SIGURD I. NILSON,

Appellees.

Apostles on Appeal.

Upon Appeal from the United States District Court for
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Filed

OCT 21 1918

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the United States District Court, in and for
the Northern District of California, First
Division.*

IN ADMIRALTY.

CARL PATSEL, W. SANDSTREN, GUST.
JOHNSON, CHAS. NELSON, A. SAND-
STRAN, M. W. JOHNSON, PETER JOHN-
SON, HUGO LUNDGREN, HARRY
SWANSON, N. P. JOHNSON, GUST.
PETERSON, CHARLES JOHNSON,
JOHN ANDERSON, KNUT ANDERSON,
A. PETTERSON, ALBERT JOHNSON,
CARL ANDERSON, M. NILSSON, JOSEF
NILSEN, and JOHAN KARLSEN, SI-
GURD J. NILSSON,

Libelants,

vs.

P. M. NELSON,

Respondent.

Praeipie for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal heretofore perfected in this court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. All those papers required by section 1 of paragraph 1 of rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit;

2. All the pleadings in said cause, and all the exhibits annexed thereto;

3. All the testimony and other proofs adduced in the cause, including the testimony taken at the trial, all depositions taken by either party and admitted in evidence, and all exhibits introduced by either party, said exhibits to be sent up as original exhibits;

4. The opinion and decision of the Court;

5. The final decree and notice of appeal; [1*]

6. The assignment of errors.

DUNCAN A. McLEOD,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Appellant.

[Endorsed]: Filed Sep. 2, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [2]

Statement of Clerk U. S. District Court.

PARTIES.

Libelants: Carl Patsel, W. Sandstren, Gust Johnson, Chas. Nelson, A. Sandstran, M. W. Johnson, Peter Johnson, Hugo Lundgren, Harry Swanson, N. P. Johnson, Gust Peterson, Charles Johnson, John Anderson, Knut Anderson, A. Petterson, Albert Johnson, Carl Andersson, M. Nilsson, Josef Nilsen, Johan Karlsen, Sigurd I. Nilson,

Respondent: P. M. Nelson.

*Page-number appearing at foot of page of certified Transcript of Record.

PROCTORS.

For the libelants: H. W. Hutton, Esquire.

For the respondent: Duncan A. McLeod, Esquire,
and Messrs. McCutchen, Olney & Willard. [3]

PROCEEDINGS.

1914.

September 26. Filed verified Libel for Shortage in Provisions, in the sum of \$3402.00.

Issued Citation for appearance of respondent, which Citation was, on September 30th, 1914, returned and filed with the following return of the United States Marshal endorsed thereon: "I have served this writ personally by copy on P. M. Nelson this 29th day of Sept., A. D. 1914.

J. B. HOLOHAN,

U. S. Marshal.

By Thos. F. Mulhall,
Deputy Marshal."

October 7. Filed Respondent's Exceptions to Libel.

31. The above-entitled cause this day came on for hearing in the District Court of the United States for the Northern District of California, before the Honorable M. T. Dooling, Judge, on the Exceptions to Libel, and after hearing duly had, the Court ordered that the matter stand submitted.

November 24. Filed Deposition of H. Swanson, taken on behalf of libelants, before Francis Krull, United States Commissioner. [4]

1914.

December 8. The Court this day filed its written order, overruling the Exceptions to Libel herein.

1915.

January 20. Filed Answer to Libel.

February 18. This cause this day came on for trial in the District Court of the United States, for the Northern District of California, at San Francisco, before the Honorable M. T. DOOLING, Judge, and after hearing duly had, it was ordered that the matter stand submitted to the Court for decision, on briefs.

May 27. The Court this day filed a written opinion, in which it was ordered that a decree be entered in favor of each libelant for the sum of \$65.50.

June 7. Filed Decree.

July 13. Filed Notice of Appeal.

19. Filed Bond on Appeal in the aggregate sum of \$1950.00, with the Royal Indemnity Company as Surety.

September 2. Filed Assignment of Errors.

24. Filed one volume of testimony. [5]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—(No. 15,709.)

CARL PATSEL, W. SANDSTREN, GUST. JOHNSON, CHAS. NELSON, A. SANDSTRAN, M. W. JOHNSON, PETER JOHNSON, HUGO LUNDGREN, HARRY SWANSON, N. P. JOHNSON, GUST. PETERSON, CHARLES JOHNSON, JOHN ANDERSON, KNUT ANDERSON,

A. PETTERSON, ALBERT JOHNSON,
CARL ANDERSSON, M. NILSSON,
JOSEF NILSEN, and JOHAN KARLSEN,
and SIGURD J. NILSSON,

Libelants,

vs.

P. M. NELSON,

Defendant.

Libel.

To the Honorable M. T. DOOLING, Judge of the
First Division of the Above-entitled Court.

The libel of the libelants above named, each of whom are seamen and residents of said district, against P. M. Nelson, ship charterer and salmon packer also of said district in a cause of wages, for shortage of provisions, civil and maritime alleges as follows:

I.

That each of the libelants and said defendant is a resident of the northern district of California, within the jurisdiction of the above-entitled court.

II.

That during the month of March, 1914, at the City and County of San Francisco, State of California, the defendant above named hired each of libelants to serve as seamen on an American schooner called the "Roy Somers," of which vessel said defendant was the charterer and operator on all of the times herein mentioned on a voyage from said San Francisco, to be a place called Koggiung in Alaska, there to catch fish for the said defendant and return as seamen on the said schooner to the port of San Fran-

cisco in the [6] State of California, and in pursuance of such hiring libelants each signed shipping articles for such voyage before the United States shipping commissioner in the said port of San Francisco, in which shipping articles it was agreed that defendant would supply each of the libelants with the scale of provisions mentioned and set forth in section 4612 of the Revised Statutes of the United States, and in pursuance of such hiring each of the libelants entered into the service of said defendant on board of said schooner at said San Francisco all as seamen and proceeded in said vessel to said Koggiung, at which place they left said vessel and went on shore and caught salmon for defendant and thereafter returned on board of said vessel as seamen and the said vessel with each of the libelants on board left said Koggiung for said San Francisco, on Sunday, August the 9th, 1914, and arrived in said San Francisco, on Monday, the 7th day of September, 1914, each of said libelants working as a seaman on such return voyage. That on such voyage both to Koggiung and return the said vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to said San Francisco, and never at any time engaged in fishing.

III.

That upon such return voyage the water given by defendant to be used for cooking food for the libelants was at all times bad, to wit, bad for a period of 29 days. That defendant failed to serve to or give to the libelants or any thereof salt port for the

period of 12 days during such voyage, neither of the libelants receiving any salt pork whatever during the same, that neither potatoes or yams were served to or given by defendant as food during said voyage at any time, defendant also failed to give to the libelants or any thereof and canned tomatoes at all during said voyage, and defendant also failed to give to either of the libelants any pease for food during said voyage, and he also failed to give to either of the [7] libelants as food any beans for two days when they were entitled to the same, to wit, on the 31st day of August and the 2d day of September, 1914, that defendant furnished to each of the libelants rice as food for but two days on said voyage, and for a period of 25 days of said voyage he failed to furnish any fruit whatever, and he also failed to furnish to any of the libelants either onions, or pickles, or mustard during any part of the said voyage, and no substitutes permitted by law were given to the libelants or either thereof for any of the above-mentioned articles of food, the said shortage being on the said homeward voyage alone, that no dried fruit was served to any of the libelants during said voyage homeward, nor did they receive any canned meat for any, to wit, four Wednesdays during said voyage or at the last Sunday thereof, or on any other day.

IV.

That by reason of the premises each of the libelants are entitled to have and receive of defendant as wages for such shortage of food and bad quality of water the following amounts respectively:

For bad water.....	\$29.00
For shortage of salt pork.....	\$12.00
For shortage of potatoes or yams.....	\$29.00
For shortage of tomatoes.....	\$ 9.00
For shortage of pease.....	8.00
For shortage of beans.....	2.00
For shortage of rice.....	8.00
For shortage of fruit of every description....	11.00
For shortage of pickles.....	12.00
For shortage of onions.....	8.00
For shortage of mustard.....	29.00
For shortage of canned meat.....	5.00
Or a total of one hundred and sixty-two (\$162.00)	
dollars to each [8] of the libelants or an aggregate	
of three thousand four hundred and two	
(\$3402.00) to all of the libelants.	

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore libelants pray that process in due form of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said defendant P. M. Nelson, and that he may therein be cited to appear and answer under oath all and singular the premises aforesaid, and that this Honorable Court will be pleased to decree the payment of the amounts aforesaid with costs, and that libelants may have such

other and further relief as the Court is competent to give in the premises.

H. W. HUTTON,
Proctor for Libelant's.

HARRY SWANSON.

HUGO LUNDGREN.

SIGUR I. NILSSON.

CARL ANDERSON.

MOLKER NILSSON.

W. SANDSTAN.

PETE JOHNSON.

UNO JOHNSON.

A. SANDSTROM.

GUST PETERSON.

GUST JOHNSON.

KNUT ANDERSON.

CHAS. NELSON.

N. T. JOHNSON.

CHARLEY JOHNSON.

ARLT PETTERSON.

CARL PATSEL.

ALBERT JOHNSON.

JOSEF NILSON.

JOHN KARLSON.

By H. W. HUTTON,
Their Proctor.

[9]

United States of America,
Northern District of California,—ss.

Harry Swanson being first duly sworn, deposes and says as follows:

I am one of the libelants above named; I have read the foregoing libel and I know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

HARRY SWANSON.

Subscribed and sworn to before me this 22d day of
September, 1914.

[Seal] MARGUERITE S. BRUNER,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Sep. 26, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. —.

CARL PATSEL, W. SANDSTREN et al.,
Libelants,

vs.

P. M. NELSON,

Respondent.

Exceptions to Libel.

Comes now P. M. Nelson, respondent above named,
and excepts to the libel of Carl Patsel et al., upon
the ground that said libel does not state facts suffi-
cient to constitute a cause of action against said re-
spondent, or at all.

WHEREFORE, said respondent prays that the
said libel may be dismissed, and that he be hence
dismissed with his costs of suit herein incurred.

D. A. McLEOD,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent.

Service of the within Exceptions and receipt of a

copy is hereby admitted this 19th day of October, 1914.

H. W. HUTTON,
Atty. for Libelant.

[Endorsed]: Filed Oct. 7, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,709.

CARL PATSEL et al.,

Libelant,

vs.

P. M. NELSON,

Respondent.

Order Overruling Exceptions to Libel.

H. W. HUTTON, Esq., Proctor for Libelant.

D. A. McLEOD, Esq., McCUTCHEN, OLNEY
and WILLARD, Proctors for Respondent.

The exceptions to the libel herein are overruled,
and respondent is allowed ten days in which to an-
swer.

December 8th, 1914.

M. T. DOOLING,
Judge.

[Endorsed: Filed Dec. 8, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [12]

*In the United States District Court for the Northern
District of California, First Division.*

IN ADMIRALTY.

CARL PATSEL, W. SANDSTREN, GUST JOHNSON, CHAS. NELSON, A. SANDSTRAN, M. W. JOHNSON, PETER JOHNSON, HUGO LUNDGREN, HARRY SWANSON, N. P. JOHNSON, GUST PETERSON, CHARLES JOHNSON, JOHN ANDERSON, KNUT ANDERSON, A. PETTERSON, ALBERT JOHNSON, CARL ANDERSSON, M. NILSSON, JOSEF NILSEN and JOHN KARLSEN, SIGURD J. NILSSON.

Libelants,

vs.

P. M. NELSON,

Respondent.

Answer.

To the Honorable M. T. DOOLING, Judge of the
United States District Court for the Northern
District of California:

The answer of the above-named respondent to the libel of the above-named libelants in a cause of wages, civil and maritime, admits, denies and alleges, as follows:

I.

Answering unto the allegations of Article I of said libel, respondent admits that he is a resident of the Northern District of California, within the juris-

diction of the above-entitled court, but is ignorant as to that part of said article alleging that each of the libelants is a resident of the Northern District of California, within the jurisdiction of the above-entitled court, and for that reason demands that strict proof of the same be made.

II.

Answering unto the allegations of Article II of said libel, respondent admits that during the month of March, 1914, at the City of San Francisco, State of California, he hired the above-named [13] libelants to serve as seamen on the American schooner "Roy Somers," of which respondent was the charterer and operator during all the times in said libel mentioned, on a voyage from San Francisco, California, to Koggiung, Alaska, there to catch fish for respondent, and to return as seamen on such schooner to the port of San Francisco, in the State of California. Respondent denies that in pursuance of said hire, but admits that the said libelants did in fact sign shipping articles for such voyage and service before the United States Commissioner in the said port of San Francisco, and admits that in the shipping articles it was agreed that respondent would supply each of the libelants with the scale of provisions mentioned and set forth in Section 4612 of the Revised Statutes of the United States, or lawful or equivalent substitute therefor. Admits that in pursuance of such contract of hire, each of the libelants entered into the service of respondent on board said schooner at San Francisco, and proceeded in said vessel to Koggiung, at which

place they left said vessel and went on shore and caught salmon for respondent, and, thereafter, returned on board said vessel and the said vessel with all of said libelants on board left said Koggiung for said San Francisco on Sunday, August 9th, 1914, and arrived in San Francisco on Monday, the 7th day of September, 1914, and that each of said libelants worked as a seaman on board said vessel on such return voyage. Respondent admits that on such voyage to Koggiung and return the vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to San Francisco, and denies that she never at any time engaged in fishing.

III.

Answering unto the allegations of Article III of said libel, respondent denies that upon such return voyage the water [14] given by respondent to be used in cooking food for libelants was at all times bad, to wit, bad for the period of twenty-nine (29) days, and in that behalf alleges that there was at all times a sufficient supply of good water on board. And if there was any failure in the water supply, it was due to the negligence of the libelants in not properly filling and caring for the water-tanks on board said vessel. That said water-tanks were the same which were used on the northward voyage.

Upon information and belief, respondent denies that there was any failure to serve or to give libelants, or any of them, salt pork for the period of twelve days during said voyage, or that none of the libelants received any salt pork whatsoever during

the same, and in that behalf alleges that said vessel was supplied, not only with salt pork, but ham and bacon, together with salt and fresh fish sufficient to answer for the purpose of said voyage.

Respondent denies that neither potatoes nor yams were served to libelants by respondent during such period, and in that behalf alleges that potatoes were taken from San Francisco on the voyage northward, but that the same could not be preserved in good condition throughout the summer months while libelants were engaged in fishing in Alaska, and that it was impossible to procure in Alaska any potatoes for the downward voyage. That the failure to have any potatoes on said voyage was due to no act of negligence or failure on the part of respondent, but was the result of natural causes over which respondent had no control.

Upon information and belief, respondent denies that there was any failure to give libelants, or any of them, any canned tomatoes during said voyage, and for the same reason respondent denies that there was any failure to give either of libelants, or any of them, any peas for food during the said voyage, and for the [15] same reason respondent denies that there was any failure to give any of said libelants as food any beans for the two days when they were entitled to same, to wit, on the 31st day of August and the 2d day of September, 1914, and in that behalf respondent alleges that if there was any failure to furnish said beans on said days, it was not because said vessel was insufficiently supplied with the same on the commencement of said voyage, but

because of the wastefulness of the cook and libelants throughout said voyage.

Upon information and belief, respondent denies that there was only furnished to each of libelants rice as food but for two days on said voyage, and for the same reason denies that for a period of 25 days of said voyage, respondent failed to furnish any fruit whatever, and for the same reason denies that there was any failure to furnish to any of the libelants either onions, pickles or mustard during any part of said voyage.

Upon information and belief, respondent denies that no substitutes permitted by law were given to libelants, or either of them, for any of the above-mentioned articles of food, and denies that there was any shortage of food on the homeward voyage. For the same reason respondent denies that no dried fruit was served to said libelants during said voyage homeward, and denies that they did not receive any canned meat for four Wednesdays during said voyage, or the last Sunday thereof, or on any other day.

Further answering unto the allegations of said article, respondent alleges that said vessel was fully supplied with sufficient food for said voyage, and if there was any shortage, it resulted from the wastefulness of libelants during said stay in Alaska, and by reason of the inability of respondent to purchase in Alaska full quantities of the required supplies. That the cook of said vessel, one of the libelants herein, was given full authority [16] to order and purchase all of the supplies procurable in Alaska

necessary for the sufficient victualing of said vessel on said voyage.

That said vessel was supplied with salt pork, corn beef, canned meats, fresh and salt pork, ham, bacon, eggs, peas, beans, onions, cheese, butter, pickles, oatmeal, rice, tapioca, pearl barley, prunes, milk, etc.

IV.

Respondent denies each and every of the allegations contained in Article IV of said libel.

V.

Respondent denies that all and singular the premises in said libel stated are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, respondent prays that the above-entitled action may be dismissed with costs.

D. A. McLEOD,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent. [17]

Northern District of California,
City and County of San Francisco,—ss.

P. M. Nelson, being first duly sworn, deposes and says:

That he is the respondent in the within-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true except as to the matters therein stated on information or belief, and as to those matters he believes to be true.

P. M. NELSON.

Subscribed and sworn to before me this 19th day of January, 1915.

[Seal]

FRANK L. OWEN,

Notary Public, in and for the City and County of San Francisco, State of California.

Service of the within Answer and receipt of a copy is hereby admitted this 19th day of January, 1914.

W. H. HUTTON,

Proctor for Libelant.

[Endorsed]: Filed Jan. 20, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Defendant.

Notice of Taking Deposition, and Deposition of Harry Swanson.

The defendant above named and his proctors will please take notice that the deposition of Harry Swanson, a libelant in said cause and a witness on behalf of himself and the other libelants therein, will be taken *de bene esse*, before Francis Krull, Esquire, *United Commissioner*, at his office United States postoffice and courthouse building, at the corner of Seventh and Mission Streets in the City and County

of San Francisco, State of California, on Friday, the 23d day of October, 1914, commencing at the hour of three o'clock in the afternoon of *that*, at which time you are notified to be present and put such interrogatories to said witness as you may see fit.

You are further notified, that the cause for the taking of the deposition of said witness is, that he is bound on a voyage to sea.

Dated October 22d, 1914.

Yours, etc.,
W. H. HUTTON,
Proctor for Libelant.

Copy received this 22d day of October, 1914.

D. A. McLEOD,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent. [19]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Defendant.

BE IT REMEMBERED that on Friday, October 23d, 1914, pursuant to notice and order of court filed in the above-entitled cause, at my office in the postoffice and courthouse building, room 308, in the City and County of San Francisco, State of California, personally appeared before me, Francis

Krull, a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Harry Swanson, a witness produced on behalf of libelants.

H. W. Hutton, Esq., appeared as proctor for the libelants, and Ira A. Campbell, Esq., appeared as proctor for the defendant, and the said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated that the deposition of Harry Swanson may be taken *de bene esse* before Francis Krull, United States Commissioner for the Northern District of California, and that the said deposition, when written out [20] may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as to materiality and competency of the testimony are reserved to all parties.

It is further stipulated that the deposition of Harry Swanson may be taken in shorthand by Herbert Bennett. It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.

[Deposition of Harry Swanson, for Libelant.]

HARRY SWANSON, called for libelants, sworn.

Mr. HUTTON.—Q. What is your name?

A. Harry Swanson.

Q. What is your occupation? A. Well, cook.

Q. How long have you been a cook?

A. I have been cook since I have been 14 years old.

Q. How long is that ago?

A. I am 24 years old now; I will be 24 years on November 17th. My name in the old country was not Harry.

Q. It does not make any difference to me what your name was in the old country; I want to know what your name is here.

A. That is my name here, Harry Swanson.

Q. Have you ever cooked at sea?

A. Yes, sir; I cooked at sea since I was 14 years old.

Q. Did you ever cook on the schooner “Roy Somers”?

A. Yes, sir.

Q. She is an American vessel, is she not?

A. Yes, sir. [21]

Q. Where did you cook; on what voyage did you cook on her?

A. From here, San Francisco to Alaska and from Alaska to San Francisco.

Q. What place in Alaska? A. Koggiung.

Q. Did you cook for all hands?

A. Yes, sir; cooked for all hands.

Q. How many men were on the “Roy Somers”?

How many sailors were on the “Roy Somers”?

(Deposition of Harry Swanson.)

A. Altogether we was 27 on the trip going up to Alaska, and 26 on the trip coming home.

Q. Did that include the captain?

A. That included the captain and all.

Q. Now, on the way down from Alaska, what kind of water did you have on her?

A. We had rotten water for cooking. We had some good water, but we could not touch that water; the captain would not let us take it before the last couple of days.

Q. What was the matter with the water?

A. Well, it was rotten. When I cooked with it they could not eat nothing, because there was some big tanks there to put the water in and in those tanks had been some wine—rotten stuff in them before. When the water had been there for a couple of days it was so rotten you could not taste it.

Q. Did you use that water for cooking all the way home?

A. Yes, sir; except a couple of the last days.

Q. Is she an American vessel, the “Roy Somers”?

A. Yes, sir; she belongs at San Francisco.

Q. Do you expect to go to sea pretty soon?

A. Yes, sir. I do not know, maybe.

Q. Are you looking for a job at sea?

A. Yes, sir.

Q. You run on the coast? A. Yes, sir. [22]

Q. Did you have any salt pork on the way home?

A. No, sir; we did not have any salt pork except just a little for pork and beans; just a little, very little.

(Deposition of Harry Swanson.)

Q. What I mean is this: did you ever at any time serve out salt pork to the men as food? A. No, sir.

Q. Was there any on the ship?

A. On the trip home?

Q. That is what I mean, on the trip home.

A. No, sir.

Q. Did you have any potatoes or yams on the trip home? A. No, sir.

Q. Did you have any tomatoes on the trip home?

A. No, sir, no tomatoes.

Q. How about peas. Did you have any peas to make pea soup with?

A. No, sir; I had for the soup—let me see, I had soup for about seven or eight days; either seven or eight days I had pea soup; green peas, I had soup of.

Q. Was that for seven or eight days after you left?

A. After I left up there; for three weeks I did not have any soup.

Q. No pea soup?

A. No pea soup for three weeks.

Q. How about beans?

A. Beans? We were short for seven days; seven days, something like that; either seven or eight days before we came to Frisco, we did not have any beans.

Q. You mean for seven or eight days before you got in? A. Before we got in, yes.

Q. How about rice?

A. Rice we only had for two days; rice for two days.

Q. Did you serve it the two days?

A. I had about six or seven pounds of rice. We

(Deposition of Harry Swanson.)

had rice for two dinners.

Q. Did you have any fruit?

A. No, sir; not for the last 14 days.

Q. Of any kind?

A. No, sir; not of any kind. [23]

Q. Was that for the last 14 days before you got in port? A. Yes, sir; before we got in port.

Q. Did you have any onions?

A. Just a couple of dozen; I had none in the last days.

Q. Was that when you left Alaska?

A. When I left Alaska. I had about 34 or 35 onions when I left Alaska.

Q. Were they ever served out per day, or did you use them for cooking?

A. I had them for the corn beef hash, except once I cooked up onions for the sailors; just a little bit, one night.

Q. Is that the only time they got onions on the way home from Alaska?

A. Yes, sir; the only time they got onions on the way home from Alaska.

Q. Did you have any mustard on the ship at all?

A. The mustard was all gone when we left Alaska; maybe for two or three days I had mustard when we came out.

Q. Did you have any canned meat?

A. Yes, sir; I had some canned meat, but it was gone a week before we came in. Just a little canned meat I gave on Sundays and Wednesdays, very little; just a little bit.

(Deposition of Harry Swanson.)

Q. Did they get the regular allowance?

A. No, sir; they got very little; just a few cans; I gave a little on Sundays and a little on Wednesdays.

Q. How many cans had you when you left Alaska?

A. I had two small cases; there were 48 cans, 12-ounce cans, of roast beef and then I had about one dozen canned corn beef—either 12 or 15 cans of corn beef when I left Alaska, and then I had some roast mutton, about 24 cans—about two dozen cans of roast mutton.

Q. Where were they used?

A. On the trip coming home from Alaska. [24]

Q. I mean, what part of the ship?

A. The same all over; fore and aft the same.

Q. That would be 60 or 63 twelve-ounce cans you had when you left Alaska?

A. Yes, small roast beef cans, but the corn beef cans, they were big, you know, big cans.

Q. How much did they hold?

A. They hold about two pounds, I guess; but the corn beef cans and those roast mutton cans are about two pounds—two pounds, yes.

Q. How many days were you coming home, do you know? A. 29 days.

Q. Do you know what day you left Koggiung?

A. We left Koggiung the 9th of August in the morning, Sunday morning, the 9th of August.

Q. And you got here on what day?

A. We got in here Labor Day, at night, 10 o'clock, the 7th day of September; we got in here about 9 or 10 o'clock.

(Deposition of Harry Swanson.)

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. Is this the first time you ever went to Alaska?

A. No, sir; I was up in Alaska last year.

Q. On what ship?

A. In the “C. A. Thayer,” the same owners.

Q. Did you file this same kind of a complaint last year when you got back?

A. No, sir; but we had very little.

Q. You did not bring the same kind of a suit last year?

A. No, sir; we had very little to eat, but we went along any way.

Q. Did you help fit this vessel out before she sailed from here in the spring?

A. No, sir; I did not. The owner does that himself. [25]

Q. When did you join the vessel?

A. I joined right—we left here on the 22d of April, either the 21st or 22d of April, we left San Francisco for Alaska.

Q. When did you join her?

A. I came on board just a couple of days before.

Q. Did you make out the provision list?

A. No, sir.

Q. Did you take an inventory of the food that was aboard of her before you started out to go to Alaska?

A. Yes, sir; he gave me just a store list; he gave me the store list after that when I came aboard.

Q. You checked it up?

(Deposition of Harry Swanson.)

A. I did not check it up; I looked after everything that came aboard, what it was.

Q. You checked it up to see all the stuff on the list came aboard?

A. It came aboard, all we had on the list here at San Francisco.

Q. You checked up the list in San Francisco to see if everything that was on the list came on board?

A. I did not check up the list; some was standing on the list that came aboard; I did not check off the list.

Q. Did you check up the food that was aboard the vessel before she sailed from San Francisco?

A. I know everything was there as soon as we got aboard.

Q. You looked it over to see what you had on board before you sailed from San Francisco?

A. Yes, sir.

Q. You knew when you went out of San Francisco as cook on that vessel, you knew what food there was on board the vessel? A. Yes, sir; I knew that.

Q. You checked it up before the vessel sailed? You counted it up before the vessel sailed?

A. Counted it up. I see everything that was aboard. [26]

Q. Did you know where you were going to when you sailed from here? A. Yes, sir.

Q. To Koggiung? A. Yes, sir.

Q. You had been there before?

A. Yes, sir, I was there last year.

Q. Where could you buy food up in Alaska where

(Deposition of Harry Swanson.)

you were going? A. Mittendorf.

Q. Mittendorf? A. Yes, sir.

Q. That is the principal store up there, is it not?

A. Yes, sir. I forget those other people in those canneries there.

Q. Alaska Packers?

A. Yes, sir, from the packers, that Astoria Company.

Q. Alaska Portland Packing Company?

A. I don't know; they call it the Astoria Cannery up there; I don't know what company it is.

Q. Who owns the principal store up there at Nushagak, Mittendorf? A. Yes, sir.

Q. You have been there? A. Not in Nushagak.

Q. Is there any store at Koggiung?

A. Yes, sir, the packers have a store.

Q. Alaska Packers?

A. Yes, sir, but I have never been there in that store.

Q. When you left here in the spring of the year you knew that your vessel was going to go to Koggiung and fish there, and then come back to San Francisco? A. Yes, sir.

Q. And you knew that you were taking up on your vessel provisions to last you on the voyage up, while you were in Alaska, and while you were coming back to San Francisco, didn't you?

A. I know they could not last.

Q. You knew what you were taking on board was food for that, didn't you? A. Yes, sir. [27]

Q. You knew when you left here you were taking

(Deposition of Harry Swanson.)

up on the vessel sufficient food to last you on the voyage up, while you were fishing in Alaska and to bring you back to San Francisco, didn't you?

A. Yes, sir.

Q. After you checked up the food on your vessel before you left San Francisco in the spring, did you tell the captain, or the owner that there was not sufficient of all these articles of food to last you for the whole voyage and the time you were in Alaska?

A. No, sir, I did not tell him that here in San Francisco.

Q. You did not say anything about that at all?

A. Except potatoes, I told him I had very little potatoes.

Q. Do you know how many potatoes were bought and placed on board that vessel?

A. We got 50 sacks of potatoes on board.

Q. You got 50 sacks of potatoes on board?

A. Yes, sir, we got 40 first, and then we got 10 sacks afterwards—eight 8 or 10 sacks.

Q. Where did you get those 10 sacks?

A. Here in San Francisco.

Q. You say all you had was 50 sacks to start out with? A. Either 48 or 50.

Q. Which was it, 48 or 50?

A. I cannot say exactly, either 48 or 50.

Q. But you made no complaint to the captain, or owner of the ship about there not being sufficient food to take you up to Alaska, last you while you were there, and while you were coming down to San Francisco?

(Deposition of Harry Swanson.)

A. No, sir, I did not make any complaint, before I got up there, I see they could not last.

Q. All the time you were fishing up there you had plenty of [28] food while you were going up?

A. Yes, sir.

Q. Everybody got fat on the trip going up?

A. They did not get fat; we had just right.

Q. Everybody was fed well going up?

A. We did not have more than we want.

Q. Everybody was fed well in Alaska?

A. Except the potatoes.

Q. What became of the potatoes, did they sprout on you?

A. The potatoes were too little; they were too little altogether; they were very bad, too.

Q. Did you have anything to do with the filling of the water tanks in San Francisco before you went up to Alaska?

A. No, sir, I did not have anything to do with it.

Q. You did not have anything to do with that?

A. No, sir.

Q. Did you have any trouble with the water going up?

A. Yes, sir, the water was bad on the trip going up.

Q. Why didn't you sue for that also, the bad water going up? A. Nobody said anything.

Q. Nobody told you to sue for that? A. No, sir.

Q. Who told you to sue for the bad water coming down? A. All hands signed.

Q. All hands signed it up?

(Deposition of Harry Swanson.)

A. Yes, sir.

Q. Where did you sign it up?

A. Up to the fishermen's union.

Q. Who got you to go up there?

A. All the fishermen were up there.

Q. Who was the one that came and got you to go up there?

A. I was cook; they want me to come along up there with them.

Q. They wanted you along up there with them?

A. Yes, sir; because I was cook.

Q. Who was the one that asked you to come, Pastel? A. No, sir.

Q. Patterson?

A. No, sir, they were there the day we got [29] paid off and there was all hands, they want some money for what they had been suffering; they want some money for that, and he would not give them anything,—so they say they want some money for that; the man would not give them anything, Mr. Nelson would not give them anything, any money for it; he said they had to go and see the fishermen's union secretary.

Q. Did you hear all this conversation you are telling about, or is that what somebody told you? Did you hear this conversation with Mr. Nelson, or is this what somebody told you? Did you hear all of this talk with Pete Nelson, or did somebody else tell you about it?

A. They wanted some more money.

Q. Who was it wanted some more money?

(Deposition of Harry Swanson.)

A. All the fishermen.

Q. Where did they ask this, before the shipping commissioner?

A. Yes, sir; they asked before the shipping commissioner.

Q. Before the shipping commissioner?

A. Yes, sir.

Q. Is that when you were signed off?

A. Yes, sir.

Q. Did you sign off before the shipping commissioner?

A. Yes, sir, I signed off before the shipping commissioner.

Q. Who did you complain to about the bad water going up?

A. They complained to me, and I complained to the captain.

Q. To the captain.

A. Yes, sir, and the captain knew it was very bad water himself.

Q. I am asking you who you complained to. When you got to Alaska, was all the water gone?

A. No, sir; we had water when we got up there.

Q. And you had good water aboard when you got up there, didn't you?

A. Yes, sir, in the big tank.

Q. How many tanks were there aboard that vessel that held water?

A. There was one big tank of water; one big tank underneath the deck and then either four or five big tanks had been wine in them before; it was rotten water in that. [30]

(Deposition of Harry Swanson.)

Q. Did you examine them to see whether the wood was rotten or not? A. The water was rotten.

Q. You did not examine them at all?

A. I did not examine them at all.

Q. Don't you know when the ship arrived in port there was still good water in them?

A. There was a little in the big tank.

Q. There was considerable in the big tank?

A. There was a little.

Q. Did you measure to see how much was in the big tank when you got in?

A. I did not measure how much water was left.

Q. Why did you say there was a little?

A. I know there was not much; the captain said there was not much himself.

Q. That is where you got your knowledge, from what the captain said?

A. I said I did not measure it.

Q. You think there were only four or five casks of water? A. Yes, sir.

Q. Which is it, four or five?

A. Maybe there are six.

Q. What is it, four or *four*, or six? You cannot tell, can you? A. I cannot say, exactly.

Q. What is your best recollection? You think there were about four, don't you?

A. I think about five.

Q. You are going to stick on five?

A. Yes, sir; but I am not sure, you know.

Q. How many of those five contained good water? In how many of those five was the water good?

(Deposition of Harry Swanson.)

A. In those five?

Q. Yes.

A. There were those five tanks with rotten water.

Q. All five tanks had rotten water?

A. Yes, sir.

Q. You did not use any of that water?

A. We had to use it.

Q. All five tanks had rotten water in them?

A. It was not tanks, casks, [31]

Q. You call them casks? A. Yes, sir.

Mr. HUTTON.—Give him a chance to answer your questions; you stop him right along.

Mr. CAMPBELL.—Q. Don't you get a chance to do all the answering you want to? A. Yes, sir.

Q. Were were you in this same vessel the year before?

A. No, sir; I was in the "C. A. Thayer," the year before.

Q. Who filled up these water-casks in Alaska for the voyage back?

A. Well, the beach man filled them, and the fishermen filled with all with fresh water.

Q. Who did the work, the fishermen?

A. I do not know; I was not on the boat; I was cook ashore there; I do not know who filled them.

Q. How soon did you go aboard the vessel in Alaska before you left there?

A. Before we left there, I came aboard Saturday afternoon about 4 o'clock and Sunday morning about 4 o'clock we left Alaska.

Q. While you were in Alaska, had you not used

(Deposition of Harry Swanson.)

water out of these casks? A. Up in Alaska, no.

Q. Not while you were in Alaska?

A. Not me, because I was ashore; I was cooking ashore.

Q. Did any of the sailors aboard the vessel use water out of the casks while they were in Alaska?

A. I do not know.

Q. Do you know whether they used any of the water out of the casks when they were in Alaska?

A. I don't know, maybe the captain used some; he was on board for awhile.

Q. Have you any knowledge about it at all?

A. No, sir.

Q. You do not know anything about it?

A. No, sir.

Q. When did you first complain about the water being bad in the casks?

A. When we came outside, out in the pass. [32]

Q. Out in the pass? A. In the Bering Sea.

Q. Through Unamuck Pass?

A. No, sir, we were not through the pass.

Q. Is that the pass you came through?

A. Yes, sir.

Q. When you came down the pass did you complain about it? A. When we were in Bering Sea.

Q. How soon after you left Koggiung did you first complain about the water being bad?

A. In a week, I guess.

Q. In a week? A. Yes, sir.

Q. The water was good then for the first week?

A. We did not take it from those casks. We had

(Deposition of Harry Swanson.)

some other small ones where there was good water in.

Q. I thought you said you only had five casks aboard and the big tank?

A. We had some barrels; we filled up some clean barrels; there was good water in it.

Q. How many barrels did you have filled up?

A. Four or five big barrels.

Q. How large were the barrels, fish barrels?

A. Yes, sir.

Q. Half barrels?

A. No half barrels; bigger than half barrels; 200 pounds fish in them barrels.

Q. Didn't you use water out of these five or six casks the first week? A. Not at the start.

Q. How soon after you began to use the water out of those casks was it that you noticed it was tainted. How soon after you began to use the water did you notice it?

A. As soon as we started to use it we noticed it was bad water. As soon as we started to use that water the fellows—the water tender said “it was awful bad water.” I said, “Yes, I know it is.”

Q. How many complaints did you ever make to the captain about the water?

A. I don't know. I told him a couple of times there was awful bad water in the tanks. [33]

Q. And he told you to use the water out of the big tank, didn't he?

A. No, he said “we have to use up that water first,” he said, “because we do not know how long a trip we got.”

(Deposition of Harry Swanson.)

Q. Didn't he tell you to take the water out of the big tank?

A. No, sir, excepting for drinking water.

Q. Do you swear to it he did not tell you to go to the big tank to get the water? A. For cooking?

Q. Yes.

A. Yes, sir, I swear to it he did not tell me to take the water from the big tank for cooking before we came down here, about a week before we come in, because he want me to use that water first; he want me to use that water first, that rotten water, because there was a water tender on board there and I had to take what he give me.

Q. You say you did not have any salt pork on the voyage at all? A. Salt pork?

Q. Yes.

A. Yes, a little; we had one pig and I killed that one—

Q. What did you—

Mr. HUTTON.—(Intg.) Let him answer the question.

A. (Contg.) I had two meals out of that pig and then we salted the rest of it, so I could cook up small pieces for the beans. We did not have any salt pork for meals.

Mr. CAMPBELL.—Q. Have you answered all you want to? A. Yes, sir.

Q. Why did you say when Mr. Hutton asked you if you had any salt pork you did not have any?

Mr. HUTTON.—He said he had salt pork for beans, but he never served salt pork out for meals.

(Deposition of Harry Swanson.)

Mr. CAMPBELL.—Let the witness testify.

Mr. HUTTON.—You have no right to state to the witness something he did not say. [34]

Mr. CAMPBELL.—I am not doing so consciously.

Q. Didn't you say you did not have any salt pork on the vessel? A. Yes, sir, we had a little.

Q. You had salt pork? A. We had a little.

Q. You had ham? A. We had bacon.

Q. Did you have eggs?

A. We had rotten eggs; not what we could use; they were rotten.

Q. Rotten eggs? A. Yes, sir.

Q. Did you have a shoulder of pork aboard?

A. Of salt pork?

Q. Fresh pork?

A. We had a little fresh pork to salt.

Q. How many pigs did you have left on the vessel coming down?

A. We had one pig and we killed that as soon as we got out; we had three pigs up in Alaska, but we killed one and one we sold and then we killed one on the trip home.

Q. You killed one in Alaska?

A. Yes, sir, and sold one and killed one on the trip home.

Q. Did you have any canned beef aboard?

A. Yes, sir, we had roast beef.

Q. Roast beef?

A. Yes, sir, and roast mutton and corn beef, but it was not enough.

Q. All used up on the trip?

(Deposition of Harry Swanson.)

A. Yes, sir, all used up before we came in.

Q. There was not any left aboard the vessel when you got back in San Francisco? A. Yes, sir.

Q. You swear to that, do you?

A. Yes, sir, I swear to it except there was some salt corn beef left, about for one meal when we got to San Francisco.

A. For one meal? A. Yes, sir.

Q. But no canned beef at all?

A. No, sir. [35]

Q. You swear to that? A. Yes, sir.

Q. How many times did you burn the beans on the voyage and throw them in the slop bucket?

A. No, sir, I did not do that.

Q. No sailor aboard the vessel saw you do that?

A. No, sir.

Q. Nobody aboard the vessel saw you do that?

A. No, sir, I never did that. I took great care because we had very little.

Q. Never once did you throw any partially cooked beans in the slop bucket?

A. Yes, sir, I cannot swear to that; I did that. When we was up in Alaska I did that because it was awfully hot and the beans started to get so—if I cooked them for dinner and I gave them for dinner or supper and there was a little left I threw them out.

Q. That was in Alaska? A. Yes, sir.

Q. Didn't you at any time on the voyage coming down throw half burned beans or half cooked beans in the slop bucket? A. No, sir.

Q. Did you throw any other food over the side of

(Deposition of Harry Swanson.)

the ship, or into the slop bucket coming down from Alaska?

A. Just a little bit that we could not use.

Q. You had plenty of bread? A. Yes, sir.

Q. Did you catch fresh fish coming down?

A. Yes, sir, in the Bering Sea.

Q. Cod fish? A. Yes, sir.

Q. All you wanted of them?

A. For a couple of days we had fresh fish as much as we wanted.

Q. Did you salt them then? A. Yes, sir.

Q. What did you do with them when you got ashore? A. What did I do with the fish?

Q. Yes?

A. I don't know what they did with that. They took care of that. [36]

Q. Didn't you have anything to do with that?

A. No, sir.

Q. Weren't you one of the sailors that was caught trying to take fish ashore? A. No, sir.

Q. What was the name of the sailor who was caught trying to sneak fish ashore?

A. That fellow that was trying to sneak fish ashore. What is his name?

Q. Patterson or Patsel?

A. I just heard there was a fellow that took salmon ashore, but—

Q. When you were—

Mr. HUTTON.—(Intg.) Let him finish his answer.

A. (Contg.) I did not see him take any ashore.

(Deposition of Harry Swanson.)

I heard there was a fellow that took salmon ashore.

Mr. CAMPBELL.—Q. When you were in Alaska you wanted to bring some fish down, didn't you?

A. Yes, sir.

Q. That is right? A. Yes, sir.

Mr. HUTTON.—I do not see what that has got to do with the case.

Mr. CAMPBELL.—Q. You had a quarrel with the master about it? A. Yes, sir, I had.

Q. And you sulked about it?

A. No, sir, I was not sulky about it; I asked Mr. Nelson if I could take a little salmon down to San Francisco. I asked Pete Nelson about it and then he started to swear. "What are you going to do with salmon," he said to me. I said "Mr. Nelson, I just asked because the other fellows take salmon," so I asked if I could take salmon, but he did not say anything, but afterwards he said, "all right, you can take a little salmon."

Q. He said you could bring a little?

A. Yes, sir.

Q. Did you bring it?

A. Yes, sir, a little keg.

Q. But you had a quarrel with the master about it? A. Yes, sir. Up there? [37]

Q. Yes. A. That is right.

Q. When you came to leave Alaska who made out the order for the provisions which were to be bought before you left Alaska? A. I did.

Q. Who did you go to about it?

A. The master.

(Deposition of Harry Swanson.)

Q. Who delivered the provisions to the ship?

A. The engineer of the launch and the skipper of the launch. I got it off him when Captain Nelson left Alaska for San Francisco; he was going so I did not get the provisions I wanted to get.

Q. You made out the list for the provisions to come back? A. Yes, sir.

Q. And you gave them to the captain?

A. Yes, sir.

Q. And he bought them where, Mittendorf's?

A. Yes, sir.

Q. Nushagak? A. Yes, sir.

Q. And those provisions were delivered to you by the engineer of the launch?

A. Yes, sir, and the skipper of the launch.

Q. And he delivered everything you ordered except some peas, didn't he?

A. Except some peas and there was some more stuff too. There was a little of it.

Mr. CAMPBELL.—That is not responsive to my question.

Q. Didn't he deliver to you all the stuff you ordered except the peas?

A. Yes, sir, but he did not deliver enough of it.

Q. He delivered all you ordered?

A. All except peas. There was not enough.

Q. He delivered all you ordered. Was not there delivered to you all of the food that you ordered except the peas? Answer it yes, or not.

A. Yes, sir, he delivered all the stuff except the peas, but there was not enough; there was so little

(Deposition of Harry Swanson.)

of it, so I get word you cannot have any more because there is no stores, no provisions to be got in Alaska; that is what the [38] engineer of the launch told me, and I said, "we cannot put to sea with that store." He says, "there is no stores to be got in Alaska," that is what the engineer say. So Mr. Nelson was going to San Francisco, so at the last minute I got seven sacks of flour, at the last minute. That is right, I got seven sacks of flour at the last minute. I told him there was not enough stores to go to sea with. I told him, "we cannot go to sea without enough stores, it is impossible."

Q. Did you have some oat meal?

A. I had some rolled oats.

Q. Did you have any left when you got to San Francisco? A. No, sir, we were short of that.

Q. Did you have any tapioca aboard?

A. Yes, sir.

Q. Did you have some of that left when you got to San Francisco? A. Yes, sir.

Q. Did you have any pearl barley on board?

A. Yes, sir, a little pearl barley.

Q. Did you have any left when you got to San Francisco? A. Yes, sir, just a little scraping.

Q. I am asking you whether you had any left?

A. Yes, sir.

Q. Did you have any prunes on board?

A. Little when we left up there, but not for the last 14 days.

Q. Didn't you serve it every day on the way down?

A. No, sir, three or four times a week I gave them

(Deposition of Harry Swanson.)

prunes, and for the last week we did not have any at all.

Q. None on board when you came to San Francisco? A. No, sir.

Q. Did you make any complaint while you were in Alaska about the food being short? A. Yes, sir.

Q. To whom?

A. To the engineer of the launch.

Q. To the engineer of the launch? A. Yes, sir.

Q. Did you to the captain of your ship?

A. The engineer of the launch. The captain of the ship, he could not do anything. [39]

Q. Did you make any complaint to the master of the ship in Alaska?

A. No, sir, I did not do that. I made complaint to the engineer because the master of the vessel could not do anything; he could not go nowhere, he had to stay aboard. I told the engineer.

Mr. CAMPBELL.—I move to strike out all the testimony concerning the conversation with the engineer.

Q. Who gave you the green peas that you had aboard? Where did you get those?

A. From that other vessel, from the other cook in the other schooner, a little green peas.

Q. From the "C. A. Thayer"?

A. Just a little green peas.

Q. How many tins of green peas did you have on board that vessel, do you know? How many tins of peas did you have on board the vessel when you left San Francisco? A. At San Francisco.

(Deposition of Harry Swanson.)

Q. Yes. A. I don't know.

Q. You do not know? A. No, sir.

Q. Have you any list of the food that was on board the vessel when she left San Francisco?

A. No, sir, I had it in the galley, but the night cook—

Q. (Intg.) You did not keep it yourself?

A. I had it in the galley, but the night cook, he threw it away somewhere. I lost that store list on the trip going up to Alaska.

Q. How much rice did you have on board the vessel when you left San Francisco?

A. I had one sack.

Q. How much did it weigh? A. 100 pounds.

Q. That is all you had? A. Yes, sir.

Q. Do you know of any place in Alaska where you could buy fruit? A. Where they could buy fruit?

Q. Yes. A. Yes, sir.

Q. Where? A. Dried fruit? [40]

Q. Fruit?

A. Yes, they could buy it over at Mittendorf's.

Q. Did you order fruit on this list you gave the master? A. Yes, sir, I ordered fruit.

Q. Was it delivered to you?

A. Yes, sir, but I did not get enough of it.

Q. How much did you specify on the order?

A. I just ordered fruit.

Q. You just ordered fruit? A. Yes, sir.

Q. Did you specify the quantity you wanted of these various articles? When you gave the order to the master did you tell him how much you wanted of each article?

(Deposition of Harry Swanson.)

A. I told him some, but not all. I did not tell him all because I said, "You know better than I, you have been here so long you know better than me what I want." I did not tell him all of it.

Q. Had you cooked on the voyage the year before?

A. Yes, sir, we were two cooks.

Q. Then you knew from previous experience how much food you would need, didn't you?

A. No, sir, I did not know exactly.

Q. Didn't you tell me a while ago upon looking at the stores when you left San Francisco that you did not have enough? A. I knew that.

Q. You were the man who was in charge of the food for all the crew going up, and while you were in Alaska, weren't you? A. Yes, sir.

Q. And when you got ready to start back to San Francisco you were the man who knew how much food was left on hand and how much you would want?

A. Yes, sir, I tell you something: up in Alaska I was short of many things. As soon as I ask Pete Nelson for anything, to buy that and that he never want to do it; he says always I was wrong.

Q. Who was? A. I had an awful time. [41]

Q. Who with? A. Pete Nelson.

Q. Who was Pete Nelson? A. The owner.

Q. Where did you have this trouble with him?

A. He say I had a little—

Q. (Intg.) Where did you have this trouble with him I am asking you?

A. He did not want to give me anything.

(Deposition of Harry Swanson.)

Q. I say, where did you have this trouble with him? A. Up in Alaska.

Q. Whereabouts did you have this conversation with him? A. Out in the station in Alaska.

Q. Can you tell me the time, when it was?

A. I cannot say exactly the day.

Q. Did you complain to him about the food?

A. Yes, sir.

Q. What did you say to him?

A. I say, "I have to get that and get that, that other fellow, that other cook come over to me and get sugar and one thing and another." Pete Nelson, he promised to, he said, "I get you that back in the fall when we come down," but I did not get it again. He tells me "I get it back in the fall," and I did not get it back; and when I ask Pete Nelson for anything I could hardly get it.

Q. You were the one who knew how much food there was on hand before you started back?

A. Yes, sir.

Q. To San Francisco? A. Yes, sir.

Q. And the captain asked you to make up a list of the food that you would need for the voyage down, didn't he? A. The captain?

Q. Yes.

A. No, sir, the captain did not ask me. He did not ask me to make any list.

Q. Who did? A. I had to.

Q. Who asked you to make out the list?

A. Pete Nelson.

Q. Pete Nelson ask you to make out the list?

(Deposition of Harry Swanson.)

A. Yes, sir, but when I gave him that list he did not like it. [42]

Q. You made out the list at Pete Nelson's request? A. Yes, sir.

Q. On that list did you specify, did you say how much you wanted of each article?

A. I did not know how much I wanted of each article. No, sir, I did not know how much I wanted of each article.

Q. Why didn't you state on that list how much you needed of each article?

A. Because I could not put anything on there because Pete Nelson was always sore at you?

Q. He was always sore at you?

A. I told him he would have to store up himself.

Q. That is the reason why you did not put on the list the quantity of each article that you wanted, because Pete Neuson was always sore at you?

A. He was always sore at me so I could not get anything.

Q. Was that the reason you did not put the quantities on the list?

A. That was the reason. I told Pete Nelson he would have to store up himself; that is what I told him.

Q. Why didn't you put the quantities on the list that you wanted?

Mr. HUTTON.—He has already explained that. He said he told Pete Nelson that he would have to store up himself.

Mr. CAMPBELL.—Q. Did Pete Nelson have

(Deposition of Harry Swanson.)

charge of the food? Did he come and count up the stuff you had?

A. Yes, sir, he come looking over the storeroom every day. As soon as he was in there he come to the storeroom and looked.

Q. Was it because Pete Nelson was always sore, is that the reason why you did not put on your list the quantities you wanted of each article? Do you understand what I am asking you? A. No.

Q. Was it because Pete Nelson was sore at you, was that why you did not have on the list the quantities you wanted of the different articles of food? Can you understand me? A. Yes. [43]

Q. Answer the question.

A. Because he was sore at me?

Q. Was that the reason why you did not put the quantities of the different articles you wanted on the list?

A. No, sir, I did not pay any attention to that; but I told him, I say I told him, "you would have to bring the stores," I say, "and take charge, you have been here so long." He has been 30 years in Alaska, so long he has experience enough. There is not that thing, he is always short of provisions every year. There is not one year he has not been short of provisions.

Mr. CAMPBELL.—I move to strike that out as irrelevant.

Q. Who wrote up the list, did you or the captain?

A. I wrote up the list.

Q. Did you write it up in your own handwriting?

(Deposition of Harry Swanson.)

A. I had the skipper on board the "Thayer" to write it up first. I had told him to write the list in English for me because I cannot write English, you know.

Q. So the captain of the "C. A. Thayer," Captain Jacobson, wrote down on the paper the food that you wanted? A. Yes, sir, on the list.

Q. What did you do—

Mr. HUTTON.—(Intg.) Let the witness finish. You don't give him a chance to finish his answers.

Mr. CAMPBELL.—I submit the question has been answered; let me follow it up with my next question and then if he desires to make any explanation afterwards, all right.

The WITNESS.—He wrote it on the list, but I did not understand that very well what he was writing. He was writing, but I did not understand that very well so I wrote up another list in half Swedish and half English and I give it to Mr. Nelson.

Q. Didn't you give that list of Captain Jacobson—
[44]

A. (Intg.) I asked him one day when he was up in the station if he will write up the list in English for me,—in American.

Q. This list you wrote in half Swedish and half English, didn't you give that to Captain Jacobson too?

A. No, sir, I gave the order when he was writing the stores. I stood alongside of him.

Q. When you gave this list to Captain Jacobson that he wrote out for you, didn't you give the quan-

(Deposition of Harry Swanson.)

tities of each article that you wanted?

A. Yes, sir, to Captain Jacobson.

Q. Did you yourself make complaint to the master of the ship that the water was not good?

A. Yes, sir, I did.

Q. Now, you say you did not have any onions?

A. I had about 35 onions when I left Alaska.

Q. How many did you have when you left San Francisco?

A. I had two gratings of Australian onions.

Q. How man did you have when you arrived back in San Francisco; how many did you have on board your vessel?

A. Not one; not one what I know of. I could not find any.

Q. Did you give the crew any salt fish on the way down? A. Yes, sir.

Q. What was the vessel loaded with?

A. We were loaded with salt salmon.

Mr. CAMPBELL.—That is all.

Redirect examination.

Mr. HUTTON.—Q. What was the name of the captain of your ship?

A. Captain Soiland.

Q. Where did he live on the ship—up in Alaska where did he live, on the ship or ashore?

A. He was living ashore, fishing at the station.

Q. How did you come to go to Captain Jacobson to make up a list of [45] provisions?

A. Because he was always a friend of mine.

Q. How many lists did you make up. Did you

(Deposition of Harry Swanson.)

make up one or two?

A. One list before the ship left, you know.

Q. You say that Jacobson also wrote one; is that right?

A. He wrote one in American for me.

Q. Which one was it you gave to the captain or Pete Nelson? A. The one I wrote.

Q. Was that in English or Swedish.

A. Half Swedish and half English.

Q. Who did you give it to?

A. To Mr. Nelson, the owner.

Q. How long was that before Nelson left?

A. That was the last time he was over. He went away, so we could not speak to him any more. We did not know he was going to San Francisco when the launch came over and he was going.

Q. How long was that before the ship left that you gave that list to Nelson?

A. They were around the 20th of July they got the stores.

Q. Was it after that that Jacobson wrote a list for you? A. Before.

Q. What did you do with the one Jacobson wrote?

A. I burned it up.

Q. Did you give that to Nelson too?

A. No, sir.

Q. Who did you give that to?

A. I was just looking over it a little while and was writing on the other piece of paper.

Q. Then, you only gave one list, did you?

A. Only gave one list.

(Deposition of Harry Swanson.)

Q. That was to Pete Nelson? A. Yes, sir.

Q. You did not give any to your captain?

A. No, sir.

Q. Did you get all of the articles that were on that list that you gave to Pete Nelson?

A. No, sir, I did not get peas, split peas.

Q. Did you get the quantities that you put on the paper?

Mr. CAMPBELL.—He testified he did not put any quantities on it. [46]

Mr. HUTTON.—Q. Did you put down how much of each stuff you wanted? A. Not all of it.

Q. Where you did put down the amount you wanted did you get that amount when the stuff came to the ship? Did you get back on the ship from the launch the amount of stuff that you told him you wanted? Did they send over to you what you asked for?

A. They sent the stores over on the order.

Q. Did they send as much as you asked for?

A. No, sir. I ordered for milk three cases of milk and I got two cases.

Q. What else?

A. I cannot remember the other things.

Q. Did you get everything that you asked for in quantity?

A. I cannot answer to that either.

Q. Do you remember anything else that you were short of; that is on the order? On the list that you gave to Pete Nelson do you remember of anything else that came back short; that is, where you did not

(Deposition of Harry Swanson.)

get as much stuff as you asked for? A. Yes, sir.

Q. What was it?

A. There was flour; I had to get that afterwards when I had the trouble with him up there to get it, to get the last of it.

Q. What trouble did you have; trouble getting stuff?

A. The trouble to get that flour; trouble to get stuff because I want some more stores when the launch came over and the engineer said "I will not run over there to Mittendorf's store." I says, "all right, I have not got stores enough to take the vessel down to Frisco."

Mr. CAMPBELL.—I move to strike that out as hearsay.

Mr. HUTTON.—Q. Did you tell that to the captain, you have not got stores enough?

A. The captain knew that. He says, "Is that the stores we got"? I says, yes, that is all I have." I says, "There will not be enough." He says, "No, that cannot be enough?" [47]

Q. Why didn't the captain get some more?

A. He could not do anything. He was no more than I was; he could not get anything.

Q. Who was the man to do the ordering up there; who gave the ordering to the store up there?

A. I ordered to the store; I should give the order to the store.

Q. You said the captain could not *go* any more than you could. Who could get stores up there?

A. Either Pete Nelson, the owner, or Mr. Ek, the

(Deposition of Harry Swanson.)
engineer of the launch.

Q. Did you make out the store list in San Francisco before the vessel went away? A. No, sir.

Q. Did you order any stores before the vessel went away? A. Some potatoes.

Q. How many sacks did you order?

A. I did not order any; Pete Nelson ordered them and I said it would not be enough.

Q. Then he gave you some more?

A. Then he gave me eight or ten sacks more.

Recross-examination.

Mr. CAMPBELL.—Q. What else was there that was short on your order excepting milk? You said you ordered three cases of milk, didn't you, and you got two. Was it milk or meat? A. Milk.

Q. What else was there short on your order besides milk? A. We were short of everything.

Q. Short of the quantity that you asked for? What else was there that you were short of besides the milk. You say you asked for three cases of milk and you only got two? A. Yes, sir.

Q. How many cases of peas did you ask for?

A. I did not ask for any peas except split peas.

Q. How many cans or pounds of split peas did you ask for?

A. I guess there are 50 pounds of split peas, put it.

Q. What was it?

A. Either 30 or 50; I cannot say exactly; I cannot remember. [48]

Q. Either 30 or 50? A. Yes, sir.

Q. How many pounds were delivered to you?

(Deposition of Harry Swanson.)

A. They did not deliver me any peas at all from Mittendorf.

Q. Did they from any other place?

A. Yes, sir, I got some little green peas from the other cook.

Q. How many pounds of those?

A. Just a little, about six or seven pounds, I guess; a small amount, six or seven pounds of green peas.

Q. How many pounds of potatoes did you order on that list?

A. I did not order any potatoes because he told me I cannot get any potatoes up here.

Q. You did not put potatoes on the list at all?

A. No, sir. That is what he told me.

Q. Who told you?

A. Pete Nelson, he said "We cannot get any potatoes or anything like that up here."

Q. Had your potatoes rotted on you at all?

A. The potatoes rotted?

Q. Yes.

A. Yes, sir, they were bad; you know it was awful hot up there; they were bad. You know they were very cheap potatoes.

Q. That is the reason they were bad, because they were cheap potatoes? A. Yes, sir.

Q. But the potatoes you took up from San Francisco rotted on you in Alaska? A. Yes, sir.

Q. So there was not any left over to come back with?

A. I had just a little to make yams with.

Q. You had just a little to make yams with?

(Deposition of Harry Swanson.)

A. Yes, sir.

Q. How many pounds rotted on you?

A. I cannot say that.

Q. You cannot tell? A. No, sir.

Q. How much salt pork did you order on this list you gave Mr. Nelson; how many pounds?

A. I did not order for any salt pork. [49]

Q. You did not order. You did not put that on the list? A. No, sir.

Q. Did you put that on the list you gave Captain Jacobson?

A. No, sir, I did not give Captain Jacobson any list.

Q. Didn't you tell him what you wanted and he wrote it down? A. Yes, sir.

Q. How many pounds of salt pork did you tell him you wanted? A. I did not tell him any.

Q. What became of that list of Captain Jacobson's, the list that Captain Jacobson wrote out; did you tear it up; the list that Captain Jacobson wrote out for you, did you tear that list up?

A. Yes, sir, I tore it up.

Q. You tore that list up that Captain Jacobson wrote out? A. Yes, sir, I tore it up.

Q. How many pounds of salt pork did you have on that list? A. I cannot remember that exactly.

Q. You do not remember there being any on there at all? A. Any pork on there?

Q. Yes?

A. No, sir, I cannot remember that.

Q. How many cans of tomatoes did you ask for on

(Deposition of Harry Swanson.)

this list you gave Pete Nelson?

A. I did not ask for any. I said, "You know what you can get in the storeroom, Mr. Nelson, you have been here a long while." I did not get any stores myself; it was not my job, I was only cook.

Q. Why, if it was not your job to make out a list and put tomatoes on it, did you make out a list at all?

A. I told Captain Nelson it is not my job to make a store list; he knew everything what I had in the storeroom; he know every piece I had in the store-room.

Q. If you were making up a list, why didn't you put on it all the [50] stuff you wanted instead of just part of it?

A. I did not do that. He know what I should have. I did not make any list here before; I did the same thing the year before and I did not make any list.

Q. How many bags or pounds of beans did you order on the list of Pete Nelson, or the one Captain Jacobson made out? A. I don't know.

Q. You did not put any down?

A. I did not order any cheese, but I got one cheese.

Q. Beans?

A. I had one sack of beans. I don't know if I ordered any.

Q. How many did you order?

A. I don't know if I ordered any.

Q. You say you got some cheese?

A. I got one cheese and I did not order for any cheese.

(Deposition of Harry Swanson.)

Q. What did you do, throw it overboard because you did not want it?

A. No, sir, I told him, I say, "I was no steward," I was only cook.

Q. How much rice did you order on the lists?

A. No rice.

Q. How much pickles did you order?

A. No pickles.

Q. Did you order any fruit? A. Yes, sir.

Q. What did you ask for, what kind of fruit?

A. I asked for prunes.

Q. Did you get them?

A. I got a small case, just a little of those.

Q. How many pounds did you ask for?

A. I don't know; I cannot tell you.

Q. Did you say the number of pounds?

A. I cannot say that.

Q. How many pickles did you ask for. You did not ask for any at all, did you?

A. No, sir, I do not think so.

Q. How many onions did you ask for?

A. Onions. I know we cannot get that up there, so I did not ask for that. [51]

Q. Did you ask for any mustard?

A. No, sir, I do not think so.

Q. Did you ask for any canned meat?

A. Yes, sir.

Q. How many cases? A. I got two cases.

Q. How many did you ask for?

A. I don't know.

Q. You did not name the number?

(Deposition of Harry Swanson.)

A. No, sir, I got two small cases.

Q. But you do not remember the number you asked for? A. No, sir.

Q. As a matter of fact you did not ask for any number?

A. I cannot say that exactly either.

Q. Have you shipped to sea?

A. Yes, sir, I have been around—

Q. (Intg.) Have you got a job now?

A. No, sir.

Q. What are you doing now, are you ashore?

A. Yes, sir.

Q. Have you shipped on any vessel? A. No, sir.

Q. You do not know when you are going to sea?

A. I don't know.

Mr. HUTTON.—Q. You may go any day?

A. Yes, sir, I may go any time.

Mr. CAMPBELL.—Q. But you have not got any job now? A. No, sir.

Mr. CAMPBELL.—That is all.

**[Certificate of U. S. Commissioner to Deposition of
Harry Swanson.]**

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I certify that on Friday, October 23d, 1914, in pursuance of the notice and order of Court filed in the above-entitled cause at my office, in the postoffice and courthouse building, room 308, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, a United

States Commissioner for the [52] Northern District of California, to take acknowledgments of bail and affidavits, etc., Harry Swanson, a witness produced on behalf of the libelants in the cause entitled in the caption hereof, and H. W. Hutton, Esq., appeared as proctor on behalf of the libelants, and Ira A. Campbell, Esq., appeared as proctor on behalf of the defendant, and that the said witness being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in said cause, deposed and said as appears by his deposition hereto annexed.

I further certify that the said deposition was then and there taken down in shorthand notes by Herbert Bennett, and thereafter reduced to typewriting; and I further certify that by stipulation of the proctors the reading of the deposition over to the witness and the signing thereof was expressly waived.

And I do further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the clerk of the United States District Court for the Northern District of California, the court for which the same was taken.

And I do further certify that I am not of counsel, nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF I have hereunto set

my hand at my office aforesaid this 24 day of November, 1914.

FRANCIS KRULL, (Seal)
United States Commissioner, Northern District of
California, at San Francisco.

[Endorsed]: Filed Nov. 24, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [53]

Testimony Taken in Open Court.

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[Proceedings Had Thursday, February 18, 1915.]

*In the District Court of the United States for the
Northern District of California, First Division.*

IN ADMIRALTY—No. 15,709.

Before Hon. MAURICE T. DOOLING, Judge.

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

Counsel Appearing:

For the Libelants: H. W. HUTTON, Esq.

For the Respondent: IRA A. CAMPBELL, Esq.

Thursday, February 18, 1915.

Mr. HUTTON.—This is an action, if the Court please, by a number of libelants for the compensation described by the statute for a shortage of provisions. I desire to call your Honor's attention to the answer. The ground of the answer all the way through says the respondent alleges on information and belief and denies that there was any failure to give these people the food they claim they were entitled to under this statute. The question in my mind is whether or not that is a sufficient denial. The respondent ought to know whether these men got food or whether they did not. I make that suggestion at this time.

Mr. CAMPBELL.—If the Court please, counsel ought to take advantage of that and move for a more specific answer if he is not satisfied. The owner of

this vessel was not on board the schooner while she was coming down from Alaska and therefore he has not positive knowledge, and can only speak on information and belief.

Mr. HUTTON.—His denial should be direct. [55*—1†]

[Testimony of Harry Swanson, for Libelant.]

HARRY SWANSON, called for the libelant, sworn:

Mr. HUTTON.—Q. You are one of the libelants in this case, are you? A. We were short of food.

Q. I say you were one of the men who signed this libel? You are one of the libelants, are you not?

The COURT.—He says he does not understand you.

Mr. HUTTON.—Q. You are one of the libelants in this case, are you not?

A. Yes, sir, I was cook on board.

Q. You were cook on the “Roy Somers,” on the voyage she made last year to Alaska, were you not?

A. Yes, sir.

Q. You went up to Alaska in her?

A. Yes, sir, Alaska.

Q. How long were you going up? A. 31 days.

Q. Where did you go to?

A. Either 30 or 31 days; I cannot say for sure; 31 I believe.

Q. Where did you go to?

A. To Koggiung, Alaska.

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Harry Swanson.)

Q. When you got to Koggiung what did you do?

A. We get ashore there.

Q. You put all the stuff ashore for fishing?

A. Yes, sir.

Q. Where did you fish from?

A. They fish from the river.

Q. Where did you men live when they were fishing?

A. They were living ashore; some of them in the boat when they were fishing.

Q. And after you got through fishing, after the fishing season was over, what did you do with the fish that were caught?

A. They loaded the vessel with fish.

Q. Then what did the men do?

A. They were loading the vessel.

Q. After they got the vessel loaded, what did they do?

A. We was off for Frisco.

Q. You went back aboard the ship again?

A. Yes, sir, we all went back, I believe. [56—2]

Q. And came back to San Francisco?

A. Yes, sir.

Q. I say you then came back to San Francisco?

A. We then came back to Frisco.

Q. How many days were you coming down?

A. 29.

Q. Where did you and the men get their food on the vessel?

A. What we got—we had a little aboard the vessel, but very little what we had; we was short of food.

(Testimony of Harry Swanson.)

Q. Where did they eat it, up forward, or in a room or where?

A. The fishermen eat forward in a room, and the officers and bosses are eating aft.

Q. Did the men all eat in the same place?

A. Yes, sir, the fishermen eat in the same place and the boss and officers was eating aft.

Q. Where was the cooking done? A. Forward.

Q. Did the vessel have any steward?

A. No, sir, had no steward.

Q. And you were the cook going up in Alaska and on the way down? A. Yes, sir.

Q. Now, on the way down to San Francisco what water did you use—that is, where was the water gotten from?

A. The water—they filled the big cask over in Nushagak, I believe; I cannot say because I was working ashore. That is what they said.

Q. Was the water gotten from the fishing station?

A. Yes, sir, the water we had in the tank.

Q. How much water was there?

A. I do not know where they took it from; I know where they left it; they left it on board the schooner; where they took it from I could not say; they took some from the station, but they did not take all of it from the station where I was.

Q. You had water in the tank? Had you tanks anywhere else? A. Water in the big cask. [57—3]

Q. How many casks were there?

A. I cannot remember exactly how many casks;

(Testimony of Harry Swanson.)

I think it was 5 or 6, something like that; I cannot say for sure.

Q. Did you have more water in the casks than there was in the tank? A. I do not know.

Q. You cannot tell that? A. I cannot tell that.

Q. What water did you use on the way down from Alaska to San Francisco, from the tank, or from the casks?

A. We used it first from the casks when we started out and then we took it from the tank.

Q. How many tanks were there—not casks, but how many tanks had she on board?

A. One big tank; I don't think there was any more on board than one big tank.

Q. Where was that tank?

A. Right underneath the galley.

Q. Below deck? A. Below deck.

Q. Where were the casks?

A. The casks were standing forward, some of them—no, they were standing aft on the trip home.

Q. And you say you used the water from the casks when you started out. How long did you use it from the casks?

A. From the casks I used it probably about 18 days, something like that, something like 18 to 20 days; something like that.

Q. What was the condition of the water? Was it good water or bad water?

A. The water from the casks was rotten.

Q. In what way was it bad?

A. It tasted so bad; the water was rotten; you

(Testimony of Harry Swanson.)

could not use it; we had to use it, but it was rotten; people could not stand the taste or smell of it.

Q. How did it taste, salty or how?

A. It tastes rotten.

Q. It had a bad taste?

A. Yes, sir, it had a very bad taste.

Q. Did you use that for cooking purposes?

A. Yes, sir, pretty near all cooking; I could not get any other water; they would not give me any other water to cook with [58—4] except for coffee; I got a little fresh water for coffee and tea, some of the other water.

Q. Where did you get that other water from for the coffee and tea?

A. They had one tank aft of that pretty good water; there was good water in that; the tank was underneath the galley and there was good water in that tank; they gave me some of that.

Q. When you got into San Francisco was there much water left; that is, of all the fresh water you had on the trip?

A. There was some water left; I do not know how much.

Q. Who told you to use this water from the cask, if anybody?

A. The skipper told me to use it, and I did not get the water myself; there was a water-tender on board and he gave the water to me, brought it to the galley,

Q. Who was the water-tender?

A. Hugo Luden.

Q. What did he do with respect to water?

(Testimony of Harry Swanson.)

A. He could not do anything else except the water he had from the boss.

Q. You say he was the water-tender; what did he do with the water, measure it out?

A. Yes, sir, he gave me so much a day.

Q. Did he give it to you—in what—how did he give it to you?

A. Buckets, and emptied it into a big barrel, into a salmon barrel.

Q. What water did the men have to drink on the way down?

A. They had good water to drink; some of the trip coming home they had good water to drink. I do not know all; I cannot say for sure if they had good water to drink the whole trip, but they had for some part of the trip anyway; that I cannot say for sure.

Q. Did you have any salt pork on board when you left Alaska?

A. Yes, a little bit we salted of a pig; we killed a pig and salted some. [59—5]

Q. How big was the pig?

A. Well, maybe it was 200 pounds; I cannot say that for sure; but that I say for a guess.

Q. Did you ever on the way down serve out on any one day salt pork as food for the men?

A. Salt pork, no, nothing; except in the beans.

Q. At no time then on the trip was any rations of salt pork fed out as salt pork for a meal?

Mr. CAMPBELL.—Let this witness do the testifying.

Mr. HUTTON.—Read the question, Mr. Reporter.

(Testimony of Harry Swanson.)

(The Reporter reads the question.) Did you ever serve out salt pork any day except in beans. Did you ever give the men a meal of salt pork?

A. No, sir, not on the trip coming home; maybe there was once; I cannot say for sure; I cannot say that for sure; I do not know.

Q. Did you have any potatoes on the way down?

A. No, sir, we did not.

Q. Did you have any yams on the way down?

A. No, sir, that we did not; we had potatoes for yeast, a little you know; just a little bit so I can make yeast up.

Q. Yeast?

A. Yes, sir, I took off a little but it was rotten, been up there a long time, and it was rotten.

Q. What was the condition of the potatoes when you left San Francisco?

A. They were very poor potatoes when we left San Francisco; we had to sort the potatoes two or three times going up to Alaska; cut them out; we had very poor potatoes going up; maybe it was only once we served them; they were very poor and we had to cut them out, cut the potatoes out with a knife; they were very poor potatoes.

Q. When did you commence sorting them on the way up?

A. It was up around Unimak Pass, somewhere I believe up there.

Q. When did they give out, if they gave out at all? When did the [60—6] potatoes give out so that you had no more?

(Testimony of Harry Swanson.)

A. After we quit in the Pass; I gave them two or three meals after that, after quitting in the Pass.

Q. What do you mean by quitting in the Pass?

A. They quit in the Pass in July.

Mr. CAMPBELL.—Q. Quit fishing?

A. Quit in the Pass in July, between the 20th and 25th, I believe, of July.

The COURT.—Q. Was that before you started home?

A. Yes, sir, when they quit fishing.

Mr. HUTTON.—Q. Did you have any canned tomatoes on the way home? A. No, sir, we did not.

Q. Did you have any peas on the way home?

A. I had about 6 or 9 cans of peas; there was enough for two times, two meals, either six or nine.

Q. Did your beans last you all the way home?

A. No, sir.

Q. How many days was there when the men should have had beans that they did not have beans; when did the beans give out?

A. We were short of beans for a week, something like that before we got in; I had to give them beans every day because I did not have anything else to give them but beans.

Q. Do you remember what day you arrived in port in San Francisco?

A. Yes, sir, we came in on the 7th of September. Was it not the 7th of September? It was Labor Day; we arrived here on Labor Day, either the 7th or 9th.

Q. Did you have any rice on the way down?

(Testimony of Harry Swanson.)

A. Yes, sir, we had a little.

Q. How long did it last?

A. I just used the rice the last two—I had rice for two days only, two or three days only; that is all I had. I give them rice when the beans have gone.

Q. Did you have any fruit on the way down?

A. We had some dried fruit, that was two weeks, I believe, [61—7] something like that; then we were short of that.

Q. Did the men get any fruit on the way down?

A. They got the same all of them, all of them got the same thing.

Q. Do you know how many days it was that the men did not have any fruit?

A. Well, I cannot say; I cannot say; for twelve days they did not have any fruit.

Q. Do you mean twelve days when they should have had it, that they did not have it?

A. Yes, sir; they are supposed to have fruit every night.

Q. Did you have any onions on the way down?

A. Very little, not the last days; I just had a couple of dozen onions when I left Alaska.

Q. What did you use them for?

A. I used them for the corned-beef hash.

Q. Were they ever cooked and served out to the men as onions? A. No, sir.

Q. Did you have any pickles? A. No, sir.

Q. Any mustard? A. No, sir.

Q. Did you have any canned meats?

A. Yes, sir, but not enough; very little of it.

(Testimony of Harry Swanson.)

Q. Did that give out? A. Yes, sir.

Q. When did it give out?

A. Six days before we come in port, I believe; the week before we came in port, something like that. I had to go very easy with it, so I cooked it two times a week except I cooked up a little at night-time for supper, I cut out a little corned beef.

Q. You say you gave it two times a week all the way down? A. Yes, sir, for dinner.

Q. That is, up to the time it gave out?

A. Yes, sir; I could not give it all the time. [62—8]

Q. How many were on the ship, do you know, up forward?

A. There was 27 men going up, and 26 men, I believe, coming home; something like that, possibly something around 26 men.

Q. Is that fisherman and sailors? A. No, sir.

Q. Altogether?

A. There were eight fishermen and there was a mess-boy and cook; that is ten.

Q. How many men were aft?

A. About five men aft.

Q. Who were they?

A. There was cooper and *beachmore* and the second mate and first mate and skipper.

Q. How many men were there would you say altogether, on the ship? A. There was 26 men.

Q. That includes the captain and cooper and the men aft? A. Yes, sir.

Q. She is an American vessel, is she?

(Testimony of Harry Swanson.)

A. Yes, sir, she is an American vessel; she belongs at San Francisco.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. You have testified to all these things once before, have you not?

A. Yes, sir.

Q. Do you remember Mr. Hutton and myself examining you once before? A. Yes, sir.

Q. Out in this same building?

A. Yes, sir, in this same building.

Q. This vessel was engaged in catching salmon off the mouth of the Nushagak River?

A. No, sir, Koggiung River.

Q. That empties into Bering Sea?

A. Yes, sir, that empties into Bering Sea.

Q. The lower end?

A. Yes, sir; I do not know what end it was, but there is some kind of an end.

Q. Just a few days after you passed through Unamak Pass? A. Yes, sir.

Q. You took on board here at San Francisco a lot of fishermen, [63—9] with fishing supplies for the catching of salmon, didn't you? A. Yes, sir.

Q. And sailed up to your fishing station at Koggiung? A. Yes, sir.

Q. And then while you were at Koggiung, everybody who was on board the vessel was engaged in one way or the other in catching salmon?

A. Yes, sir.

(Testimony of Harry Swanson.)

Q. That salmon was salted down in barrels, was it?

A. Yes, sir, it was salted in barrels, in a tank first, and afterwards in barrels.

Q. In tanks or casks first and then afterwards in barrels? A. Yes, sir.

Q. After the salmon quit running or until you had filled up all your casks or barrels, whichever it was, then you quit your fishing and everybody came back on the vessel? A. One man did not come.

Q. Do you know Pete Nelson, the man who you are suing?

A. Yes, sir, I have been with him two seasons.

Q. What other fishing vessel did he send to Alaska with the "Somers"? A. The other vessel?

Q. Yes. A. The schooner "C. A. Thayer."

Q. She was about the same size as the "Somers" was she not, a similar vessel?

A. A little bigger.

Q. She engaged in fishing, going from San Francisco and fishing in Alaska, and then returned to San Francisco just as your vessel did?

A. Yes, sir.

Q. Only the "Thayer's" fishing station was not at Koggiung, but she was at Nushagak?

A. The "Thayer" went to Nushagak?

Q. Yes. A. Yes, sir.

Mr. HUTTON.—Your Honor, this man's deposition was taken; of course he is in court, and I could not use it. [64—10]

Q. You say you had worked for Pete Nelson two

(Testimony of Harry Swanson.)

years? A. Two summers.

Q. Two summers? A. Yes, sir.

Q. That is, during the two fishing seasons?

A. Yes, sir.

Q. What vessel were you on?

A. The "C. A. Thayer."

Q. In what capacity? A. In what capacity?

Q. What did you do on her? A. I was cook.

Q. Cook? A. Yes, sir.

Q. When you left San Francisco did you go over the provisions which your vessel had?

A. I see what was there, yes.

Q. From your previous experience in working for Pete Nelson the summer before as cook on the "Thayer," you knew just exactly what you were going to be required to do last summer?

A. I was not the steward on board.

Q. You did not have a steward? A. No, sir.

Q. They do not carry stewards on fishing vessels?

A. Yes, sir, the bigger ones.

Q. The Alaska Packers? A. Yes, sir.

Q. The bigger ones? A. Yes, sir.

Q. They are big sailing vessels? A. Yes, sir.

Q. This is a small one? A. Yes, sir.

Q. You knew from your experience on the "Thayer" the year before just what you would be required to do on the "Somers," didn't you? You knew from acting as cook on the "Thayer" the summer before what you were to do?

A. Yes, sir; I knew as much the first year as I did the last year.

(Testimony of Harry Swanson.)

Q. And you knew as much the last year as you did the first year?

A. Yes, sir, exactly the same thing.

Q. When you went aboard the "Somers" here in San Francisco you knew that she would have to carry most of the supplies that would be used on the voyage going up, while you were fishing in [65—11] Alaska, and while on the voyage coming back, didn't you? A. Yes, sir.

Q. Now, when you went aboard the "Somers" as cook did you go over the provisions that were on board the vessel to see what you had?

A. Yes, sir, I seen what I had.

Q. And you found out what you had?

A. Yes, sir.

Q. Did you ask Pete Nelson at that time to get any more provisions than what you had?

A. Yes, sir, I asked for more potatoes.

Q. Did he get them for you?

A. Yes, sir, he got some, but not so much as I wanted.

Q. He got some, but not as much as you wanted?

A. Yes, sir.

Q. Did you ask for anything else besides potatoes?

A. I cannot remember; I know I asked for potatoes.

Q. That is the only thing that you can remember asking for? A. Yes, sir.

Q. And you were the man who had charge of dealing out the food, what quantity should be given, and

(Testimony of Harry Swanson.)

when it should be given to the members of the crew, or did anybody else have charge over the cooking besides yourself?

A. Not over the cooking, but over the food; there was someone in charge.

Q. Who was it?

A. The beach boss in Nushagak.

Q. Anderson? A. Yes, sir.

Q. He went up with you? A. Yes, sir.

Q. He did not come down with you?

A. No, sir.

Q. All during the fishing season Anderson was at Nushagak? A. Yes, sir.

Q. And you were at Koggiung? Yes, sir.

Q. So you had absolute control yourself over the cooking and serving of food to the fishermen while you were at Koggiung, and on the voyage back?

A. Yes, sir.

Q. Where did you buy provisions in Alaska? What store was [66—12] there around there?

A. I do not know. I just heard there was a store over in the place. I never went there.

Q. What kind of a place is Koggiung?

A. Where they fish.

Q. Is there a town there, or just a station?

A. I never was down there; maybe further up; I do not know.

Q. There was no town where your station was?

A. No town.

Q. Where were you the year before in the "Thayer," in Nushagak?

(Testimony of Harry Swanson.)

A. No, sir, I was in the same place.

Q. Have you ever been to Nushagak?

A. Just once.

Q. Is there any store there?

A. I never saw any.

Q. The only store you ever heard of in that section of Alaska is Mittendorf's store at Nushagak?

A. Yes, sir.

Q. When your vessel came to leave Alaska to come back to San Francisco, did you go over the list of your stores that you had on board your vessel, to see what you had left? A. Yes, sir, I seen.

Q. Now, you could not read English very well, could you? A. Read a little.

Q. Along towards the close of the fishing season when you were getting ready to come back to San Francisco you got a hold of the captain of the "Thayer," didn't you? A. Yes, sir.

Q. And you told the captain of the "Thayer" to write down for you the list of the provisions which you wanted for the return voyage, which he was to buy from Mittendorf's store, didn't you?

A. Yes, sir; he was not the one to buy; the old man, Mr. Nelson, he should buy.

Q. Pete Nelson told you to buy whatever you wanted at Mittendorf's? A. No, sir.

Q. Had he not told you to send to Mittendorf's?

A. He told me, he say, "You can put up a little list which you want" he say, and I did that, just a little bit, the same summer and got the stores for me at Koggiung to send over to the [67—13]

(Testimony of Harry Swanson.)

other place, and he told me I should get it back in the fall; I never got it back from there.

Q. Pete Nelson told you to make up a list of stuff you wanted from Nushagak?

A. He told me to make up a list.

Q. Before you left up there and when you were getting ready to leave to come back to San Francisco, you and the captain of the "Thayer" made up a list of the stuff you were to get from Mittendorf's store, didn't you?

A. The captain of the "Thayer" made a list, but I did not use that list. I wrote the list myself.

Q. It is a fact that you and the captain of the "Thayer" marked down and made out this list together?

A. Yes, sir, we were sitting at the table together.

Q. Sitting at the table together? A. Yes, sir.

Q. Where, on board the vessel?

A. Sitting in the dining-room.

Q. Where? A. Up at the station.

Q. Where did you keep your provisions in Alaska?

A. In the storeroom up at the station; there was a little bit on board.

Q. Did you keep them under lock and key at the station?

A. Yes, sir. The door was locked all the time, not in the daytime.

Q. Who had the key? A. I had the key.

Q. It was not locked in the daytime?

A. No, sir; I was around there.

Q. You had the key to the door? A. Yes, sir.

(Testimony of Harry Swanson.)

Q. Did the captain of the "Thayer" ever go into the storeroom at the station and look over the stores to see what provisions you had left, and to see what you would need?

A. Yes, sir, he was there many times in the storeroom.

Q. When you got ready to make up your list did he go over and see what you had left? A. No, sir.

Q. When you got ready to make up your list did he go over to [68—14] see what you had left?

A. No, sir.

Q. Who did that?

A. Nobody except Captain Nelson; he was running in and out 50 times a day into the storeroom.

Q. Before you had made up this list Captain Nelson had left. Who do you mean by Captain Nelson? Pete Nelson? A. Yes, sir.

Q. He had left at that time?

A. He was there at that time.

Q. Did the captain of the "Thayer"—what is his name? A. Captain Jacobson.

Q. Did he tell you what to put down on this list?

A. He told me some, I believe.

Q. But you told him what to write down?

A. Yes, sir.

Q. Did you ever show this list to Pete Nelson?

A. Not that list that the captain of the "Thayer" wrote. I wrote another one.

Q. You did not show this list that the captain of the "Thayer" wrote? A. No, sir.

Q. What did you do with this list that the captain

(Testimony of Harry Swanson.)

of the "Thayer" wrote? You took and copied that, didn't you?

A. No, sir, I wrote that. I just looked over it a little in the storeroom, and then put up a little list, some things what I was going to have.

Q. You added to the list that the captain of the "Thayer" made. You added more stuff to the list that the captain of the "Thayer" wrote down?

A. I cannot remember that.

Q. What change did you make in the list?

A. I cannot remember that now, what change I made.

Q. Why was the captain of the "Thayer" assisting you in making up a list?

A. We were sitting and making it together.

Q. What for? Getting ready to come back to San Francisco?

A. There could not be enough, what we had then. My figure was there when I made this list. Pete Nelson, he be running it, [69—15] and he can order what I want. I give him this list, and he can say; he would be running in and out the store every day. He could go into the storeroom, and he know exactly which stores was there himself. He had been in Alaska so many years, he would know exactly.

Q. Pete Nelson was in charge?

A. He was the owner. He has been up in Alaska so many years; it is the same thing every year, he is always sure of provisions. It is exactly the same for the two years I have been with him; it is a long time ago.

(Testimony of Harry Swanson.)

Mr. CAMPBELL.—I move to strike that out.

Q. Did you see the year before?

A. No, sir, we had very little to eat the year before, too.

Q. Did you show Pete Nelson this list that you had written up? A. Yes, sir, I gave it to him.

Q. What did he do with it? What did you give it to him for? A. What should I do with it?

Q. What were you going to have him do with it—take it to Mittendorf's? A. To get some stuff.

Q. That is, you gave it to him to take up to Mittendorf's? A. I don't know what he do with it.

Q. Did Pete Nelson ever tell you you could not have the stuff you ordered on the list?

A. Did he ever tell me?

The COURT.—Q. Did you get anything you put on the list? A. No, sir, I did not.

Mr. CAMPBELL.—Q. What didn't you get?

A. Well, I can't remember now, but I know I did not get it all; I cannot remember; it is a long time ago; but I know I did not get all that I ordered; maybe I get something I did not order. I did not order cheese, I remember that. I got a piece of cheese.

Q. You got cheese?

A. I got cheese 35 days before we come to San Francisco. [70—16]

Q. Now, Mr. Swanson, we are talking about the list that you made up just before you came to San Francisco.

A. Before we came to San Francisco?

(Testimony of Harry Swanson.)

Q. Yes. A. That is the list we got.

Q. Was that 40 days before you reached San Francisco that you made up that list? A. Yes, sir.

Q. How long was it before you sailed; just a day before you sailed?

A. No, it was before we left, I could not say that for sure.

Q. Who brought the list back from Mittendorf's? Did the captain of the "Thayer" and the engineer of the launch?

A. I do not know; I never saw them coming back.

Q. Who brought the provisions back?

A. They brought it back on board a little steam launch.

Q. Who brought them back?

A. The captain and the engineer.

Q. The captain of the "Thayer"? A. Yes, sir.

Q. And the man named Ek, the engineer of the launch? A. Yes, sir.

Q. Did you check over the provisions at that time?

A. No, sir.

Q. Just the day before the vessel sailed—how far was it from Koggiung to Nushagak?

A. How far? I do not know. I have never been that way; you will have to ask somebody else.

Q. It took some time to go there and back?

A. Some time; yes, I guess they did take a day.

Q. Then, the day before the vessel sailed you said to Ek, who was engineer of the launch, that you did not have the peas? A. Yes, sir.

Q. And if he went over to where the "Thayer"

(Testimony of Harry Swanson.)

was to get some peas and bring them back to you?

A. Get little peas; it was nothing.

Q. For him to get peas and bring them back?

A. Yes, sir. [71—17]

Q. Did you tell the engineer of the launch there was anything else missing besides the peas?

A. I told him some flour.

Q. You got extra flour?

A. The flour we had, there was some wet and some damp; I tried to make bread, but I could not make bread.

Q. While we are on the flour, you still had flour when you reached San Francisco, didn't you?

A. Yes, sir.

Q. You had this big iron tank, and the water casks in the ship?

A. I do not know about the iron tank below deck.

Q. Didn't you ever go down in the hold and see it?

A. I was in the hold; I cannot remember; it was an iron tank.

Q. Do you know how much water it held?

A. No, sir.

Q. Did you use water out of the tank going up?

A. Yes, sir.

Q. Was the water all right that was taken out of the tank going up? A. Yes, sir.

Q. Was the water all right in the tank coming back? A. Yes, sir.

Q. How much water did you have in the tank coming back? A. I do not know.

Q. There was some left? A. Yes, sir, some left.

(Testimony of Harry Swanson.)

Q. Do you know what quantity of water it held, what size tank it was?

A. No, sir. The captain told me once, but I forget.

Q. Now, in addition to that you had seven casks, wooden casks, *wooden casks*, didn't you?

A. I do not know how many it was; five or six; that is what I was told, 5 or 6; I cannot remember how many. I cannot say for sure whether it was seven; 5 or 6.

Q. Do you know what size the casks were?

A. I don't know; they were big casks all right.

Q. Then you had one very large cask, didn't you?

A. One little white cask belonged to the vessel; it was standing [72—18] aft for drinking water just for the officers.

Q. Do you know how large that was?

A. I do not.

Q. Was the water in that all right?

A. Yes, sir, it was fine water there.

Q. You had 4 or 5 barrels of water besides the casks and iron tank, didn't you?

A. I do not know; I never was asked. There was a man giving me water that way; I do not know how many barrels there was; just the cask I see was standing on the deck.

Q. Do you remember being asked this question and answering it: the question that was asked you on your deposition out here the other time? I think you said you had five casks aboard and a big tank. "We had some barrels, 5 or 6 big barrels"?

(Testimony of Harry Swanson.)

A. I cannot remember exactly; it is a long time ago.

Q. But you had 4 or 5 barrels of water in addition to the iron tank, and in addition to the casks?

A. The rest of the people who was on board know that just as good as I do.

Q. You do not know what water the vessel had?

A. No, sir, I did not have anything to do with it.

Q. But those casks—when those casks were filled in Alaska ready for the voyage coming back who filled them, the members of the crew?

A. Members of the crew; I did not see that; I do not know that. They say they filled up some in Nushagak.

Q. You had two pigs still living, at the time you got ready to come back?

A. We had two pigs; we killed one in Alaska and the other one the captain sent over to Nushagak to give it for provisions because that is what they told me.

Q. Is that something you are guessing at?

A. That is what they told me, for provisions.

Q. Did you weigh this pig?

A. No, sir, but I can take a guess—the last pig we killed weighed 200 pounds, something like that.

[73—19]

Q. That is, dressed? A. Yes, sir.

Q. You killed that on the way down, didn't you?

A. We killed that up in Bering Sea when we were two or three days off.

Q. Off Koggiung or Unimak Pass?

(Testimony of Harry Swanson.)

A. Off Koggiung in Bristol Bay.

Q. You had fresh pork on board the vessel the first two or three days you were out? A. Yes, sir.

Q. You had lots of pork on board that vessel, didn't you? A. Yes, sir.

Q. You had lots of salt fish; did you serve salt fish to the crew? A. Yes, sir, I cooked it.

Q. You cooked the preserved fish? A. Yes, sir.

Q. Did you salt down this fresh pork?

A. Yes, sir, the cooper did it.

Q. There were 200 pounds of salt pork?

A. Something like that; it was not 200 pounds because I used some.

Q. How often did you serve the fresh pork—every day?

A. The fresh pork, no, I did not serve it every day.

Q. How often did you serve it?

A. There was one or two days between.

Q. One or two days between that you did not serve it? A. Yes, sir.

Q. How many days a week did you serve that fresh pork?

A. There was one or two days between each time I served it, one or two days between each time I served it for dinner.

Q. How much of it did you salt down?

A. I do not know; I used it a couple of times for dinner; I served it a couple of times for dinner, three dinners I guess, of it, and then the cooper salted down the rest of it. [74—20]

Q. Then you served salt pork after that?

(Testimony of Harry Swanson.)

A. It was not salt pork; I just took it off and put it in the barrel and then it was gone; I just had a little bit left for beans.

Q. Did you have bacon aboard the vessel?

A. I had three bacons on board when we left Alaska, 8 or 10 pounds apiece.

Q. Did you have an opportunity to catch fish on the way down? Did they catch fresh cod on the way down? A. Yes, sir, they caught some codfish.

Q. Did you serve that to them?

A. Yes, sir, I served that to them.

Q. On this list that you made out to be purchased from Mittendorf's store, did you put on the list any potatoes?

A. No, sir, but I asked Mr. Nelson for potatoes and he said we cannot get it up in Alaska, he said.

Q. You did not put on the list?

A. No, sir, I cannot remember it; maybe I put it on, but I do not think so, because I asked Mr. Nelson for potatoes and he says, "We cannot get them in Alaska, and you know you cannot; you cannot expect to get potates up here."

Q. You knew from your pervious experience that it is impossible to buy potatoes in that section of Alaska? A. What?

Q. You knew from your previous experience that it is impossible to buy potatoes in that section of Alaska in the summer-time? A. Yes, sir.

Q. And it is a fact that prior to the time you got ready to start back on your voyage, that the potatoes you did have rotted? A. Yes, sir.

(Testimony of Harry Swanson.)

Q. And you threw them away?

A. I did not throw them away.

Q. You did not throw any potatoes away?

A. No, sir, because if there are any potato peels left I give it [75—21] to the pigs for feed.

Q. What did you mean by saying you gave beans to them every day, that you gave beans to the crew every day?

A. I had to give them beans every day on the trip down when we do not have any potatoes; you have to give them beans or something for the salt fish and salt meat.

Q. You knew when you started from Alaska that you had no potatoes on that list that you made out for supplies to be had from Mittendorf's store, and you asked for beans, and put down the quantity of beans that you wanted?

A. Yes, sir. I do not know for sure.

Q. How many times a day did you serve those beans, three times or two times? A. Twice a day.

Q. How many days was it that you did not have beans?

A. It was for a week, something like that that we did not have beans; I cannot say that, exactly.

Q. You said you had no rice?

A. Only for a couple of days we had rice; I give them rice afterwards when the beans was gone.

Q. After the beans were gone, you served rice?

A. Yes, sir.

Q. How many times a day did you serve rice, once a day at dinner time?

(Testimony of Harry Swanson.)

A. I had only a little rice, only served it once a day at dinner time.

Q. Did you have any sago or tapioca?

A. I could not use it.

Q. You knew that there was sago on board the vessel when you got back? A. No, I cannot say.

Q. Don't you know that there was sago on board your vessel when you got back?

A. I know there was tapioca; I cannot say about sago.

Q. You had fresh fruit on board, and you served it every day until it was gone?

A. Not every day; one day and not the next, and then the next.

Q. Every other day? A. Yes. [76—22]

Q. You ordered fruit from Mittendorf's, didn't you? A. Yes, sir.

Q. That was delivered to you, was it not?

A. Yes, sir; I got some.

Q. Did you make any pies out of the fruit?

A. No, sir; I did not have fruit enough.

Q. You had onions on board the vessel?

A. A little.

Q. You used them for hash? A. Yes, sir.

Q. You had canned meat on board the vessel?

A. Yes, sir; I had to use onions and bread in the meat, to grind up the meat for hash.

Q. You had canned meat when you arrived in San Francisco? A. No, sir.

Q. When you arrived in San Francisco, didn't you actually have canned meat, and serve it?

(Testimony of Harry Swanson.)

A. No canned meat that I know of; maybe there was a little standing in the place, but there was none for the last 4 or 5 days, I believe.

Q. Were the sailors who were served in the forward part of the vessel given the same kind of food as those who were served in the aft part of the vessel? A. Yes, sir.

Q. Everybody got the same thing? A. Yes, sir.

Q. You had lots of butter? A. Plenty.

Q. So much butter, that you used it to fry things with? A. No, sir.

Q. Who did it,—some of the sailors?

A. I never seen anybody doing it.

Q. You also had bread and butter standing around, so the crew could eat it all night long?

A. We did not have enough for coffee; we were out of it a couple of days.

Q. As a matter of fact, didn't you have coffee boiling all night long so that the men could go in there during the night and drink coffee?

A. They got coffee at 12 o'clock at night, and 4 o'clock in the morning, I believe; there was a night cook; I [77—23] do not know whether he gave coffee.

Q. You don't know what was going on at night?

A. I could not stay up at night to see it, I had to be in my bunk sometime.

Q. You had lots of sugar left on arriving here at San Francisco, didn't you?

A. Not lots of it; I had maybe 8 or 9 pounds of sugar; there was brown sugar, but no white sugar;

(Testimony of Harry Swanson.)

I had a little left.

Q. Did you have eggs when you started back?

A. We could not use them; they were rotten, and we could not use them.

Q. Did you salt them down while in Alaska?

A. No, sir; we got salt eggs on board here in San Francisco; we could not use them.

Q. Couldn't you keep them up there?

A. No, sir.

Q. Did you have to throw away the eggs that were rotten,—did you actually throw them away?

A. I never throw away anything; I let them stand in the box, but they were rotten.

Q. You had lots of prunes on board?

A. Very little; they are included in the dry fruit; at night-time I changed off prunes, and fruit, I gave them fruit one day and prunes the next.

Q. Had you used up all your canned tomatoes before you left up there?

A. All the canned tomatoes was gone, maybe I had one or two cans on board, I cannot say that; I believe they were gone; I cannot say that; I had very little up there. Maybe there was one or two on board left.

Q. Did you see Pete Nelson yesterday?

A. Yes, sir.

Q. You had a conversation with him, didn't you?

A. Yes, sir.

Q. You told him you would come up here and testify for him to-day if he would give you a job this year? [78—24]

(Testimony of Harry Swanson.)

A. He says, Pete Nelson says, he asked me if I wanted a job. I did not want a job with him there; I had enough for two years.

Q. Didn't you go to Pete Nelson yesterday and tell him you would come up here and testify for him to-day if he would give you a job this year?

A. Yes, sir.

Q. Don't you know you, and all these other men, had been trying to secure a job from Pete Nelson to go back this year?

A. I don't know about the others; I had a job this year; I would not go with him; those two times was enough.

Q. Didn't you ask Pete Nelson if he wanted you to come up here for the trial?

A. He says to me, "You be there to-morrow." I says, "All right." I had my orders from the secretary of the union to be up here and not Pete Nelson's orders.

Q. Is the secretary here? A. Yes, sir.

Q. This man with glasses? A. Mr. Hyland.

Q. Didn't you ask Pete Nelson if he wanted you to come up here and testify?

A. No, sir; that I did not.

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. HUTTON.—Q. You are working now, are you,—you have a job now, have you, here in San Francisco? A. Yes, sir; I have a job.

Q. Where are you working?

A. I am working in a clubroom.

(Testimony of Harry Swanson.)

Q. What club? A. Pohler's Social Club.

Q. Have you any intention of going back to Alaska this year? A. Yes, sir.

Q. You may go back? A. Yes, sir.

Q. Who ordered the stores in San Francisco before the ship left? A. Captain Nelson.

Q. Were they ordered before you joined the ship?

A. I do not know who ordered them; I believe he did. I never ordered any. [79—25]

Q. Were they ordered before you joined the ship or afterwards?

A. I know the stores came on board; when I had been on board of couple of days, then the stores came.

Q. Did you have anything to do with the ordering of them? A. No, sir.

Q. When you say Pete Nelson, you mean P. M. Nelson?

A. Yes, sir; we always say Pete Nelson up in Alaska.

Q. Was there any food taken from your vessel to some other place in Alaska?

A. Not from the vessel, but from the station; when we came up to the station we took the food ashore; then the other cook, he run short of food over in the other place in the "Thayer" and then they came over to me and got sugar and everything.

Q. Was that brought back? Did they bring back as much stuff as they took away?

A. No, sir; they did not bring back anything from there except a little peas, I got once on the last day; he promised me I would get everything back from

(Testimony of Harry Swanson.)

there, but I got very little.

Q. And that list you say you made up, how long was it before the vessel left Koggiung that you made that list up?

A. It was before Pete Nelson left. He left 14 days before we left up there. He left Alaska then. I did not know he was to leave. Nobody know he was to leave; he left fourteen days before we did.

Q. Did you put on the list the quantities that you wanted?

A. I did not put that on; we had plenty of time, and I thought Pete Nelson, he would know about that food; he was in the store with me; he knew exactly what I had.

Q. You did not put on this list how much of each kind you wanted? A. No, sir.

Q. You just simply put down the articles you wanted?

A. Maybe something I put down, I cannot remember that; maybe I [80—26] put down something; I cannot remember exactly.

Q. Who brought over to you the stuff that you did get?

A. Mr. Jacobson, on board of the "Thayer"; he runs a launch up in Alaska.

Q. Who had charge up there after Nelson left, if anyone?

A. I do not know; there was three or four bosses; I do not know how many. There were so many bosses there that I did not know who had charge of the place, exactly.

(Testimony of Harry Swanson.)

Q. Where was the captain of the "Roy Somers" during that time?

A. He was on board his vessel during the last days and was looking about when they were loading the vessel.

Q. Did you ever talk to him about the amount of towage you had before leaving Alaska?

A. I talked to him a little.

Q. What did you tell him?

A. I told him all we had. He says, "Yes, what shall we do about it," something like that. He knew we were short, too, they all knew we were short.

Q. You said you could not use the tapioca; why couldn't you use it?

A. That tapioca I used for tapioca was some we had; that tapioca Mr. Nelson gave to me I used that, but the captain of the "Roy Somers" he had some old tapioca that was standing since the "Roy Somers" was sailing on the coast there, so he told me, "You can see if you can't use that," he said to me.

Q. Could you use it?

A. The captain eat some; it was standing there, but I could not use it.

Q. Why?

A. It looks very bad, black stuff.

Q. The "Roy Somers" had been laying up before she went on that trip?

A. Laying up for 8 or 9 months, the captain told me.

Q. After the vessel left, you caught fish on the way down; about the codfish you caught on the way

(Testimony of Harry Swanson.)

down, how much codfish did you catch?

A. They caught very good codfish; they caught some codfish; they salted it down. I gave them fresh [81—27] codfish, and I gave them salt codfish.

Q. How many days were you on the fishing banks where you could catch codfish?

A. Probably 10 or 12 days about, I believe.

Q. Calm weather?

A. Yes, sir; but we could not fish every day. We was in that part where we could fish 10 or 12 days, but there was only once in a while they could fish.

Q. Did you speak to anybody up there before you left about not having enough food? A. I told—

Mr. CAMPBELL.—(Intg.) We object to that.

A. I told everybody on board.

Mr. HUTTON.—Q. Did you speak to any of the bosses? A. I told Ek about it.

Q. Who was he?

A. The engineer of the launch.

Q. This engineer of the launch? A. Yes, sir.

Q. What did he have to do with affairs up there?

A. Captain Nelson was gone; I did not know what I should go up there; I had to tell somebody, and he was running the launch.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. Did you ever testify in this way in your deposition—this question was asked you up here: “Didn’t he,” referring to the engineer of the launch, “deliver to you all the stuff you ordered

(Testimony of Harry Swanson.)

except these peas?

A. Yes, sir; but he did not deliver enough of it.

Q. He delivered all you wanted?

A. All except peas; there was not enough." You got all that you ordered except the peas, didn't you?

A. Well, I cannot say for sure.

Q. Do you remember testifying when I asked you about this list that you made up with Captain Jacobson,—I asked you what did you do with the list: "Q. Was it after that that Jacobson [82—28] wrote the list for you? A. Before."

The COURT.—Does it make so much difference what he ordered, if the obligation is on the ship; can he evade the obligation by saying some cook did not order it?

Mr. CAMPBELL.—I do not say that; I am not sure that we are bound by that provision of the statute, as counsel says, but we may be subject to another one.

Mr. HUTTON.—The law is very clear on that.

Mr. CAMPBELL.—Here is a man that is suing because of a lack of adequate food, and we believe the evidence will show that he had it within his power to order this food that he needed, if he wanted to.

The COURT.—That may be true; if the obligation is upon the master or owner to furnish these supplies, can they be evaded by saying they were not ordered?

Mr. HUTTON.—I remember a very long time ago that I tried a case before Judge De Haven, where the charge was, a failure to supply certain articles,

(Testimony of Harry Swanson.)

and a similar question was raised there, to Mr. Campbell's theory here, and the judge held that it was not only the duty of the master to furnish them, but to see that the men got it.

Mr. CAMPBELL.—That was on a deep sea voyage.

Mr. HUTTON.—But the principle is there; it all comes in the same statute.

The COURT.—If these men do not come under the statute they are out; if they do come under the statute the obligation of the owner cannot be evaded by saying the men did not order it, or that any particular man did not order it. It was your duty to furnish it, see that it was furnished. I am only stopping it because it seems to me we are consuming a lot of time and not getting anywhere. [83—29]

Mr. CAMPBELL.—Q. Do you remember burning the list that Captain Jacobson made for you?

A. If I burned the list?

Q. Yes.

A. I do not know if I burned it; I could not tell you.

Q. Do you remember testifying in your deposition that you burned the list?

A. Maybe; I could not say for sure.

Q. The question was asked you: "What did you do with the one that Captain Jacobson wrote?"

A. I burned it up."

Q. Do you remember that?

A. I cannot say; it was a long time ago; maybe I burned it.

(Testimony of Harry Swanson.)

Q. What was the trouble—were you one of the men that had trouble with Captain Nelson about his refusing to let you take salt fish off of the vessel?

A. No, sir, I did not have anything to do with that.

Q. There was trouble between the captain and the crew, the crew wanted to take salt fish off the vessel and he would not let them?

A. I did not have anything to do with that; I had nothing to do with it; I only had the cooking.

Q. Didn't you testify in your deposition that Nelson was sore about that, and that there was a quarrel about that? A. I do not know, sir.

Q. There was trouble between Nelson and the crew about the crew taking fish off the vessel after they got back to San Francisco?

Mr. HUTTON.—I do not see that that has anything to do with the facts of this case.

A. I did not have anything to do with that; I was cooking.

Mr. CAMPBELL.—Q. You knew about this quarrel between Nelson and the sailors?

A. Yes, sir; I know we were starving aboard the vessel. That is what I know. I know on my own part of it. [84—30]

Q. Do you know about this quarrel between Captain Nelson and the sailors about taking fish off the vessel? Didn't Captain Nelson have trouble with the sailors after they got back here in San Francisco because they wanted to take fish off the vessel?

A. I could not say for sure if they had any trouble. I just had a little salmon. I just heard that. I did

(Testimony of Harry Swanson.)

not have anything to do with that.

Mr. CAMPBELL.—That is all.

[Testimony of Charles A. Nelson, for Libelant.]

CHARLES A. NELSON, called for the libelant, sworn.

Mr. HUTTON.—Q. You are one of the libelants in this case, are you not? A. Yes, sir.

Q. And you went up to Alaska on the “Roy Somers” and returned back last year? A. Yes, sir.

Q. On the way up did you have any opportunity of looking at the potatoes? A. Yes, sir.

Q. What did you do, if anything, with respect to the potatoes?

A. Sorting them and picking them out.

Q. When did you commence to sort them?

A. Somewhere around three weeks after we left from here.

Q. What kind of potatoes were they?

A. They were poor grade of potatoes.

Q. When you started to sort them what was their condition?

A. Well, part of them was rotten and commenced to grow, and of course one-third was wasted.

Q. On the way down did you have any potatoes served to you? A. No, sir.

Q. What was the kind of water that you had on the way down?

A. We had some bad water, not fit to be used; we had some parts good water, too. [85—31]

Q. What part was good water?

(Testimony of Charles A. Nelson.)

A. That was what they had in the main tank, and then one cask too.

Q. The other water, what kind of water was that?

A. That was brought from the station at Nushagak, brought in casks and they put the casks on board and that water was not fit to be used.

Q. Was that used?

A. Yes, sir, part of it, not quite all.

Q. How long was it used; that is, for how many days?

A. I do not know how many days; about two weeks.

Q. For cooking, how long was it used?

Mr. CAMPBELL.—Let this witness state what he knows about the cooking.

A. Anything that was cooked in the water you could taste.

Mr. CAMPBELL.—Q. What was your position on the vessel?

A. Sailor and fisherman.

Q. Did you have anything to do with the cooking there? A. No, sir.

Mr. HUTTON.—Q. Did you see the water used on the ship?

A. Yes, sir.

Q. Was any of the water from the casks used for cooking, to your knowledge? A. Yes, sir.

Q. For how long a period? A. Three weeks.

Q. Did you men up there have anything to do with getting that water? A. Not the main casks.

Q. Who put it on the ship?

(Testimony of Charles A. Nelson.)

A. It was some gang on the beach, and then the captain and some men; they were placing the barrels, but not filling them.

Q. Did you have any salt pork on the way down served to you as a meal?

A. Not that I can remember.

Q. Did you have any canned tomatoes served to you on the way down? A. No, sir.

Q. Did you have any peas served to you on the way down? [86—32]

A. Yes, sir, we had peas, but I do not remember how long exactly; I cannot tell you the exact time.

Q. Did you have beans served to you on the way down? A. No, sir.

Q. How many days were you short of beans?

A. 3 or 4 days; around there. I do not remember exactly now.

Q. Did you have rice served to you on the way down? A. No, sir.

Q. How many days were there that you should have got rice when you did not get it; do you know?

A. That I could not make a statement on.

Q. When did it give out?

A. That I could not make a statement on.

Q. Did you get any fruit on the way down?

A. We had a little dried fruit when we were first out.

Q. For how long? A. I cannot remember.

Q. Were there any pickles served to you on the way down? A. No, sir.

Q. Any onions served to you on the way down?

(Testimony of Charles A. Nelson.)

A. We had onions but not enough; we had onions enough to sprinkle on the corned-beef hash.

Q. Were onions ever served to you on the way down? A. No, sir.

Q. Was any mustard ever served to you on the way down? A. No, sir.

Q. Was any canned meat ever served to you on the way down?

A. Part of the voyage, at the start.

Q. Were there any days when you should have got canned meat, that you did not get it?

A. Yes, sir.

Q. Do you know how many days?

A. I could not tell you exactly.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. What do you mean by the beach gang? [87—33]

A. Men that were working on the beach, the summer right through.

Q. You devoted your time up there in fishing in the boats, catching fish, and the beach men preserved the fish? A. Yes, sir.

Q. They were all part of your crew?

A. Yes, sir.

Q. You had nothing to do with the getting of this water at all? A. No, sir, not a thing.

Mr. CAMPBELL.—That is all.

Redirect examination.

Mr. HUTTON.—Q. Do you know where that water was gotten from?

(Testimony of Charles A. Nelson.)

A. They brought the bigger part of it in casks from Nushagak; I think it was the biggest part.

Q. How far is that from Koggiung, where you were?

A. I could not tell you; between 50 and 75 miles; 65 miles.

Q. How was it brought down? Brought down in a launch or lighter? A. In a launch.

Q. And who ran the launch?

A. Captain Jacobson at that time.

Mr. HUTTON.—That is all.

I have three other witnesses. Do you admit they will all testify substantially the same as this man?

Mr. CAMPBELL.—Let me finish with this man first.

Q. These periods of time that you have given are simply approximations on your part. You did not keep any record as to when you were sure of anything? A. I did not keep no record.

Q. And you have not thought very much about it since last September, have you?

A. When we just came down, first, in port, we made a statement.

Q. Did you make any complaint to the master on the way down? A. No, sir.

Q. You never did?

A. The captain and I were good friends; I made no complaint. [88—34]

Q. You made no complaint at all to the master about the food? A. No, sir.

Q. When you got down here you signed off before

(Testimony of Charles A. Nelson.)

the shipping commissioner without making any complaint?

A. Well, we had a little complaint; we made up our minds that we would take our pay; we made no complaint before we took our pay.

Q. What was the trouble between Mr. Nelson and you members of the crew about taking fish off the vessel, taking salmon; were you one of the men?

A. I had a little keg of salmon bellies; before we got out fishing we had no water-breakers in the water supply in the fishing boat, so he said he had none; but if that was the case he should have told the cooper to make some; Mr. Nelson said the boys would have to loan water-breakers, and he would allow them to take a little keg of salmon bellies in the fall.

Q. You did not have any trouble about the salmon?

A. No.

Mr. HUTTON.—Q. Those salmon bellies are not canned?

A. No, sir.

Q. They are either thrown away or salted?

A. They are generally thrown away.

Q. It is customary for men to bring salmon bellies down, a keg or two on the vessel?

A. Mr. Nelson told every one of us that we could bring a little keg down.

Q. Before you signed off before the shipping commissioner, you did make a demand on Nelson, didn't you, for compensation for shortage of food?

A. Yes, sir.

Q. All of the men did that? A. Yes, sir.

(Testimony of Charles A. Nelson.)

Mr. HUTTON.—That is all.

Mr. CAMPBELL.—Q. How much did you ask in dollars and cents?

A. We asked between the ten fishermen \$500.
[89—35]

Q. There were only ten of you then that were making the demand at that time; is that right?

A. Yes, sir.

Q. This \$500 was to be divided between ten men out of the 25?

A. Yes, sir, but after that the fishermen, the beach men came in the case too.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—Q. You spoke about a list that you had made up of the shortage before you arrived in San Francisco after you arrived here?

A. We made a statement what we had.

Q. Did you sign that? A. Yes, sir.

Q. Was your memory fresh on it then? Did you remember just the days you were short at that time?

A. At that time, yes.

Q. Is your name on that?

Mr. CAMPBELL.—I object to the witness seeing the document until we have an opportunity of inspecting it.

Mr. HUTTON.—I just asked if his name was on that.

Mr. CAMPBELL.—Never mind the typewritten part; just point to the signature? A. Yes, sir.

Mr. HUTTON.—Q. Was this made up under your direction?

(Testimony of Charles A. Nelson.)

A. All directions.

Q. All of you together? A. Yes, sir.

Q. Who made it up? A. We made it up.

Q. Can you look at that now and tell how many days you were short of food and what you were short of on any particular day?

Mr. CAMPBELL.—May I have an opportunity of examining him?

The COURT.—You may.

Mr. CAMPBELL.—Q. Where was this made up, —in the lawyer's office?

A. No, sir, in our secretary's office; in the secretary of the union's office.

Q. Who type wrote this, the secretary of the union? A. I believe so. [90—36]

Q. Don't you know? A. Yes, sir.

Q. Did you see him do it?

A. No, sir, I did not see him do it; nobody else would do it.

Q. Did you dictate to him what you wanted written on this paper? A. Not me, the others.

Q. Did he write it down at that time?

A. We just made a statement, did not write it down.

Q. And then you all, all of you men signed your names here? A. Yes, sir.

Q. What is your name? A. Charles Nelson.

Q. Did you keep any record on the voyage at all as to the number of days you were out of stuff?

A. No, sir, I did not keep any record.

Q. You could not have told the first day when you

(Testimony of Charles A. Nelson.)

arrived in San Francisco just how many days you did not have pork, could you?

A. Yes, sir, pretty close.

Q. Could you tell accurately how many days you did not have pork when you first arrived in San Francisco?

A. At that time we could tell pretty close.

Q. What would you say it was?

A. I do not know; at that time we could tell; we would not be out of the way one day *one day* at that time because we knew it. I did not keep track of it since.

Q. Were you able to tell when you got to San Francisco how many days you did not have beans?

A. Yes, sir.

Q. And were you able to tell upon your arrival in San Francisco how many days you did not have these other articles? A. Yes, sir.

Q. How many days was it that you did not have beans?

A. I do not know exactly now. As I stated before, it is a long time and I did not keep track of it; I think it was 4 or 5 days but I do not remember; I do not remember the exact number of days. [91—37]

Q. Who made up this list—who helped make up the list?

Mr. HUTTON.—He already said they were all together?

A. All together.

Mr. CAMPBELL.—Q. How did you agree upon the number of days of each one of these shortages?

(Testimony of Charles A. Nelson.)

A. All of us.

Q. After talking it over amongst you?

A. We all knew it.

Q. You did not keep any record upon it?

A. I did not keep no record about that.

Mr. CAMPBELL.—I object to the use of the document for the purpose of refreshing his memory.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—Exception.

Mr. HUTTON.—Q. Look at that, Mr. Nelson, and tell us the amount of food and the number of days you were short of different articles of food that you testified to. Refresh your memory from that paper as to how many days you were short salt pork?

A. Short salt pork for 26 days.

Q. How long?

A. We had no pork for 26 days.

Q. And the next article, how many days were you short on that?

A. No potatoes or yams for 29 days.

Q. And the next?

A. No canned tomatoes for 29 days.

Q. And the next?

A. No canned peas for 22 days; no beans 7 days; had rice twice on the voyage, 29 days. No coffee for two days; no molasses for 29 days; no fruit of any kind for 25 days; no pickles of any kind for 29 days; no onions with the exception of four dozen which were sprinkled in the corned beef hash; no mustard for 29 days.

Mr. CAMPBELL.—Q. Who counted up the four dozen onions, did you?

(Testimony of Charles A. Nelson.)

A. No, sir, the cook.

Q. This statement contained in here in regard to the four dozen [92—38] onions is what somebody told you?

A. I did not count the onions. The cook would be able to prove that.

Q. You do not know whether that statement is true?

A. If we had any more we would have had more onions.

Q. You do not know whether that statement is true, about there being only four dozen onions?

A. I could not tell you exactly.

Mr. CAMPBELL.—That is all.

[Testimony of Antone Jansen, for Libelant.]

ANTONE JANSEN, called for the libelant, sworn.

Mr. HUTTON.—Q. You were on the “Roy Somers” on her last voyage, were you not, on her voyage up North to Alaska and return? A. Yes, sir.

Q. What were you doing on her?

A. Fisherman and sailor.

Q. You men all ate together, did you not?

A. Yes, sir.

Q. And you all got your food in the same place?

A. Yes, sir.

Q. What kind of water did you get on the way down?

A. The water was on the bum—most of it; we had some good water; part of the water was good and some of it was on the bum.

(Testimony of Antone Jansen.)

Q. Bad water used? A. Yes, sir.

Q. Where did the water come from?

A. From Nushagak, that was bad.

Q. Did you men have anything to do with putting on the vessel? A. Not us.

Q. Did you have anything to do with the potatoes, and if so, what? A. Helped sorting them.

Q. You helped sorting them? A. Yes, sir.

Q. How long was it before you started to sort them? [93—39]

A. After we left San Francisco and were two or three weeks out; I could not tell you exactly.

Q. What kind of potatoes were they?

A. They were not of much account.

Q. What was the matter with them?

A. Part of them were spoiled.

Q. Much wasted in them? A. Yes, sir.

Q. On the way down did you get any salt pork?

A. I think we got some the first few days; I do not remember how long.

Q. Was that salt pork out of the barrel or the pig they killed?

A. It must have been out of the barrel; it was very little good.

Q. How many days that you should have got it?

A. I do not know exactly; 20 days anyway.

Q. You got no potatoes on the way down, did you?

A. No, sir.

Q. Any canned tomatoes? A. No, sir.

Q. Any peas?

A. I could not tell you; we were short, I do not

(Testimony of Antone Jansen.)

know how long; I do not know how many we had.

Q. Were you short of beans at any time?

A. Yes, sir.

Q. How long?

A. A few days the last part of the trip.

Q. Were you short of rice at any time?

A. Yes, sir.

Q. You say you were short of beans; did you get any beans at all at the time you say you were short?

A. No, sir.

Q. Did you get any rice at the time you were short?

A. No, sir.

Q. Did you get any fruit on the way down?

A. We had some drier fruit when we started.

Q. How long did that last? A. 5 or 6 days.

Q. Did you get any pickles at all on the way down?

A. No, sir.

Q. Did you get any onions on the way down?

A. A few.

Q. Were there any onions served to you as a meal?

A. No, sir. [94—40]

Q. Did you get any mustard on the way down?

A. No, sir.

Q. Did you have any canned meat on the way down? A. Yes, sir.

Q. How long did that last, if at all?

A. We were short of it 3 or 4 days; I do not know just how long.

Mr. HUTTON.—That is all. ,

Cross-examination.

Mr. CAMPBELL.—Q. Did you make any com-

(Testimony of Antone Jansen.)

plaint to the master about the food?

A. Yes, sir, on the way coming down.

Q. What did you say?

A. I told him we were short of grub.

Q. What did you say to him?

A. I could not say anything.

Q. What did you say?

A. I said he was short of grub.

Q. When did you say that to him?

A. I could not say.

Q. What day was it?

A. I do not know exactly.

Q. About what day?

A. After we left Unamak Pass.

Q. What did you say to him when you went to him?

A. I asked him what to do about it. He said he could not do anything himself.

Q. What did you say to him?

A. He said he could not very well do anything; there was nothing on board.

Q. What did you say?

A. I said we were short of grub.

Q. Is that all you said to him?

A. And the water was spoilt.

Q. Did you personally go to him, you yourself?

A. The other men was all talking to him every day, the mate and all.

Q. The water in the bank tank was all right?

A. Yes, sir.

Q. The water in the five barrels was all right?

A. And the one cask, the main tank was pretty good.

(Testimony of Carl Patsel.)

Q. That was the tank that was aft?

A. Yes, sir.

Q. Could anybody help themselves to get it?

A. Yes, sir. [95—41]

Q. Anyone could help themselves to drink out of that barrel?

A. Yes, sir, they had a bucket there.

Q. Did you ever complain about any specific article of food because you did not have a sufficient amount?

A. Yes, sir.

Q. What one? A. No fruit.

Q. Did you mention the specific article to the captain? A. I mentioned everything.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—Q. Do you know how much water you had left when you came in here?

A. I could not tell you.

[Testimony of Carl Patsel, for Libelant.]

CARL PATSEL, called for the libelant, sworn.

Mr. HUTTON.—Q. Mr. Patsel, you were on the “Roy Somers” on her last trip? A. Yes, sir.

Q. What did you ship as?

A. Sailor and fisherman.

Q. You were sailor and fisherman?

A. I was beach gangman and then they put me in the boat, and I was fishing.

Q. What kind of water did you have coming down?

A. Rotten.

Q. Where was the water gotten from?

A. Out of casks, barrels.

Q. Where did you get it from, in Alaska?

(Testimony of Carl Patsel.)

A. I do not know where they got it from, but they got it from Nushagak, I know, because I see the launch *in* the barrels with it.

Q. Some water you got yourself there?

A. Yes, sir, that was good water.

Q. Do you know how much water was left on the ship when you got in? A. No, sir.

Q. Did you get any salt pork on the way down?

A. A little that was from the fresh pig they killed. I guess they thought if they did not kill that they would have died. [96—42]

Q. Did you have any potatoes on the way down?

A. No, sir.

Q. Did you have any canned tomatoes served to you on the way down? A. No, sir.

Q. Did you have any pig served to you on the way down? A. For a few days.

Q. How long did it last; I cannot just tell you how long it lasted.

Q. Were you short of beans at any time?

A. Yes, sir.

Q. How many days, do you know?

A. Six days I know for sure.

Q. How about the rice?

A. Rice, we had it twice.

Q. You had rice twice on the trip?

A. Yes, sir.

Q. How about coffee?

A. I know we had coffee for awhile, and I remember the coffee disappeared; we had no more.

Q. Did you have any fruit? A. A little.

Q. For how long?

(Testimony of Carl Patsel.)

A. From the beginning for about two weeks I guess.

Q. Did you have any pickles on the way down?

A. No, sir.

Q. Did you have any onions of any kind served to you as a meal? A. No, sir.

Q. Did you have any mustard? A. No, sir.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. Now, Mr. Patsel, will you tell me the trouble you had with Mr. Nelson about the salmon?

A. I had no trouble with Mr. Nelson about the salmon.

Q. What was the trouble that you had with him about the extra pay?

A. After we was going out fishing,—I signed on at \$35 a month, and he took me out of the beach gang and sent me out fishing where I had to work night and day, and there was no rest for me to get sleep; when I came ashore I got about two hours sleep and then he sung out on the dock, to get [97—43] to work again. I see no reason why I should not get more money.

Q. The truth was one of you fellows got hurt?

A. Yes, sir.

Q. And you volunteered to take his place?

A. No, sir.

Q. Didn't you volunteer to take his place?

A. I could not say no.

Q. You wanted his pay instead of the injured man

(Testimony of Carl Patsel.)

receiving his pay?

A. No, sir, I wanted the pay that the union calls for; I signed supposed to get paid, and I am supposed to get paid what I make in pay.

Q. The result was you and Nelson had a very bad quarrel? A. Yes, sir.

Q. And then you also had a quarrel about your taking a barrel for the packing of your fish?

A. No, sir, I never had a barrel for packing my fish.

Q. Did you have any trouble about bringing your salmon? A. No, sir.

Q. Was not coffee served all night on that vessel, at any hour of night? A. No, sir.

Q. Did you make a try to get it?

A. Yes, sir, when I had watch on deck.

Q. Could you not get it? A. No, sir.

Q. Never at any time?

A. No, sir; we got it at 12 o'clock and when we went below again.

Q. 4 o'clock? A. 4 o'clock.

Q. What time did you try to get it and failed?

A. I went there and asked the cook; he says "No, you cannot have it, you can only have it when it is time." That coffee was made at 8 o'clock at night and kept there until 4 o'clock.

Q. Where did you get this water?

A. I did not get it. I know they got it at Nushagak; it was already in barrels.

Q. Where were the barrels put, in the iron tank?

(Testimony of Carl Patsel.)

A. I never watched that; I know they dumped some water in the tank; the other water was put in barrels aboard. I do not know where the rest of the water was.

[Testimony of Axel Peterson, for Libelant.]

AXEL PETERSON, called for the libelant, sworn.

Mr. HUTTON.—Q. Peterson, you are one of the libelants in this case, are you not? A. Yes, sir.

Q. You went up and came down on the “Roy Somers” on her last voyage? A. Yes, sir.

Q. All you men ate together on the vessel and got the same kind of food, didn’t you? A. Yes, sir.

Q. What kind of water did you have coming down? A. It was rotten.

Q. Do you know how much water she had left when she got in?

A. I could not tell you; I do not know how much she had; that is for him.

Q. Was the water all gone from the casks on deck when she came in?

A. Yes, sir, that was all gone.

Q. How many days was that before she got into San Francisco? A. I could not tell you.

Q. Did you get any salt pork on the way down?

A. I never saw anything.

Q. Did you get the same food as the other men got?

A. Yes, sir.

Q. Did you get any potatoes or yams on the way down? A. No, sir.

Q. Did you have any canned tomatoes on the way down? A. No, sir.

(Testimony of Axel Peterson.)

Q. You had no canned tomatoes or other tomatoes?

A. No, sir.

Q. Did you have any peas?

A. We had peas for three days, I guess; that is all we had.

Q. Did you have any beans?

A. We had beans; when we got along, [99—45] we were short of beans 5 or 6 days before we got here.

Q. Did you get rice all the way down?

A. Three times before we got in is all we had. I guess they were short of that, too.

Q. How about fruit?

A. We had some dried fruit; that lasted a few days.

Q. Did you have any pickles? A. No, sir.

Q. Did you get any onions?

A. We had onions in the hash.

Q. Did you ever have onions served out as a meal?

A. No, sir.

Q. Any mustard? A. No mustard.

Q. Did you have canned meat?

A. We had some corned beef a couple of times; we had some corned beef I guess that was left up there; that was all, and we had it as long as it lasted.

Q. Did you have anything to do with sorting out the potatoes on the way up?

A. No, sir, I did not sort any.

Q. Did you see it done?

A. I saw it done a couple of times.

Q. Did you see the potatoes as they were sorted out? A. Yes, sir.

(Testimony of Axel Peterson.)

Q. What kind of potatoes were they, good or bad?

A. The worst kind of stuff, not much account; they were as bad as they could be.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. How many bushels were there to a sack? A. I could not tell you.

Q. Did you see the sacks? A. No, sir.

Q. You are the man who had the quarrel over the salmon berries with Captain Nelson?

A. I never had much quarrel; he said I could have salmon bellies; I told him I had some; I guess the rest had the same thing.

Q. Didn't you have trouble with Nelson about packing codfish? A. No, sir. [100—46]

Q. Didn't you pack codfish against his order?

A. In Alaska?

Q. Yes. A. Coming down I salted some down.

Q. In Alaska didn't you quarrel with him about packing codfish?

A. With Nelson, no. He was not on the ship.

Q. Did you talk to Peter Nelson about it?

A. No, sir, he did not have anything to do with it.

Q. Didn't he tell you not to use the ship's barrels for the packing of fish and you insisted on doing it?

A. He told me not to use the barrels.

Q. And when you got down here to San Francisco you took 150 pounds of fish off the ship?

A. I did not.

Q. Didn't you have a quarrel with Pete Nelson about taking fish off the ship?

(Testimony of Axel Peterson.)

A. He asked me if I had any fish; I says "Yes"; he says I had it in barrels, what you call kegs. I says "I catch some for the table for eating."

Q. When you got here you took off the ship one-half a keg of fish, 120 pounds of salmon bellies?

A. I can tell you I guess everybody in Alaska do the same thing; I have been going up quite a few years.

Q. Words passed between you and Pete Nelson about taking fish off the ship?

A. He spoke to me, he asked me if I had fish; I says "Yes, I have some." He says "That is all, you have it away now"; that is all I heard about it; I guess the rest had the same thing. I guess they had three or four times as much as I had.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—Q. The codfish you caught yourself? A. Yes, sir.

Q. Nelson was not engaged in catching codfish?

A. I caught it myself; I used it on the table, you know.

Q. And you had one keg of salmon bellies?

A. Yes, sir, and a keg of codfish? [101—47]

Q. Where did you catch the codfish, in Alaska or on the ship?

A. Outside of Bering Sea, coming home.

Mr. CAMPBELL.—Q. Didn't you have trouble at that time with Peter Nelson about the cask you were using? You had trouble with him; he insisted on your using your own cask, and you wanted to use the ship's cask, didn't you? A. No, sir.

(Testimony of Axel Peterson.)

Mr. HUTTON.—Q. How much is a cask worth?

A. I cannot tell you.

Q. Is it worth as much as 25 cents?

A. I guess 25 cents. I used it for my own use.

Q. Was it a second-hand cask? A. Yes, sir.

Q. Was it used before you got it?

A. I had the codfish in it, brought it from San Francisco myself. I used it for salmon; I took it on the voyage.

Q. Did they look about the same size, both of them? A. Pretty near the same size.

Q. How much did you pay for the one you took up from San Francisco? A. Four-bits.

Q. 50 cents? A. Yes, sir.

Mr. HUTTON.—That is our case, your Honor.

(A recess was here taken until 2 P. M.) [102—48]

AFTERNOON SESSION.

Mr. HUTTON.—I expect a certified copy of the shipping articles here in a few minutes, if the Court please, and with that exception we close.

[Testimony of David Davis, for Respondent.]

DAVID DAVIS, called for the respondent.
Sworn.

Mr. CAMPBELL.—Q. What is your business, Mr. Davis?

A. Wholesale groceries, dairy produce and provisions.

Q. Have you any connection with the firm of Dodge-Sweeney & Company of this city?

A. Yes, sir.

Q. Do you know whether Dodge-Sweeney & Com-

(Testimony of David Davis.)

pany outfitted Captain Peter Nelson's vessel last spring when he went to Alaska? A. Yes, sir.

Q. The schooners "C. A. Thayer" and "Roy Somers"? A. Yes, sir.

Q. Have you any knowledge as to the character of provisions that were furnished by Dodge-Sweeney to Mr. Nelson? A. Yes, sir.

Q. Were any potatoes furnished? A. Yes, sir.

Q. Will you kindly explain to the Court the condition of the potatoes?

A. The best that could be procured in the market.

Q. What do you mean by saying the best that could be procured in the market?

A. Well, you know in the spring of the year potatoes are not as good cutters as they are earlier in the season, or later; it is between seasons; it is too early for the new potatoes and the old potatoes more or less will not keep any great length of time. The great trouble with potatoes—all our trouble with potatoes, shipping them to Alaska is on account of their going bad; you see, the potatoes are put in bins or storehouses and kept there, and when they are taken out [103—49] they are not firm, and the bad ones are thrown out; they resprout and that is the trouble with shipping potatoes up north.

Q. How long have you been engaged in your present business? A. 29 years.

Q. From what you know of the potatoes that were furnished to these vessels, and your knowledge of the condition of the potatoes to be obtained in the market at that time, or season of the year, will you state

(Testimony of David Davis.)

whether or not any better potatoes could have been procured than were furnished to Captain Nelson?

A. Absolutely not; there could not be better potatoes procured than were furnished to the "Roy Somers" or the "Thayer." As I related before, we all have trouble with potatoes.

Q. Did you have charge of making up the account of the purchases which were made by Captain Nelson for the vessels? A. Yes, sir.

Q. Can you without referring to the itemized account there, tell the Court in general the character of provisions which he purchased for those vessels?

A. Everything that Captain Nelson purchased through the Dodge-Sweeney Company was of the best goods, all standard merchantable goods.

Q. Can you now tell the Court the different varieties of articles of food that were purchased?

The COURT.—If you have an account there I suggest that would be the most expeditious way of finding it out.

Mr. CAMPBELL.—Is this the account of the supplies that went to the vessel?

A. Yes, sir.

Q. I notice the account is only made to the "C. A. Thayer" and owners?

A. Yes, that is correct. That is the way we charge all the goods going out to vessels, as the Spreckels Company or the Matsons. [104—50]

Q. Then this account also includes the goods going to the "Roy Somers," not the "Thayer"; the "Roy Somers" has a bill of theirs. I think each ves-

(Testimony of David Davis.)

sel was charged separately.

Q. I hand you this package of bills and ask you whether or not that is the account of the provisions which were furnished to the "Roy Somers" by your firm?

A. Yes, sir. These are our bills, and were our goods, the goods we sold to Captain Nelson.

Q. Are all the articles mentioned there?

A. Yes, sir.

Q. Could any better goods of their kind be purchased in the market? A. No, sir.

Mr. CAMPBELL.—I offer these bills in evidence.

(The bills are marked Respondent's Exhibit "A.")

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. How many sacks of potatoes did you furnish?

A. That I could not tell offhand. I think—

The COURT.—Q. Are they shown on the bills?

A. I think that will show on the bill, the number of sacks.

Mr. CAMPBELL.—Q. Did you receive the order?

A. I received it.

Q. Do you remember how many were ordered?

A. No, sir, I could not tell you offhand.

Q. Now, before the potatoes that were furnished were taken to the "Roy Somers" they were sorted, were they?

A. Yes, sir.

Q. And some of them had deteriorated?

(Testimony of David Davis.)

A. Yes, sir, some of them had deteriorated.

Q. And it was to be expected, I presume, that they would deteriorate to some extent?

A. There is no question about that. They would not keep, all of them, the summer through.

Q. Do you ever handle Australian potatoes?

A. No, sir. [105—51]

Q. Don't you know, for anyone else going to Alaska fishing in the way Nelson does use Australian potatoes?

A. I never heard of them taking Australian potatoes; I heard of them taking Australian onions.

Q. The potatoes in March and April of each year get so they are in bad condition?

A. They are not so bad; of course they are not like the ones in the fall of the year, naturally.

Q. Don't you know, as a matter of fact, that Australian potatoes can be had in the market?

A. I never heard of them.

Q. Of course, then you do not know anything about them?

A. Not Australian potatoes.

Mr. HUTTON.—That is all.

The COURT.—Q. What percentage of the potatoes are reasonably expected to deteriorate at the end of the season, from the time you furnish them until they get bad in September?

A. That all depends upon how long you keep them; as I related before there is none of the packers that goes north that does not have a great deal of trouble with potatoes. One of the largest firms here

(Testimony of David Davis.)

says the worst feature of their business was to get potatoes, and some of them have vessels that go up there with potatoes, to supply them from every six to eight weeks, and they might be able to get some new potatoes later on.

Q. Potatoes will deteriorate from the time they are furnished to the end of September?

A. Yes, sir, more or less.

Q. Would that not be obviated by taking a larger supply?

A. No, sir, I think they would take a larger supply, but as I understand it the potatoes are not firm and they will sprout, and they have to be taken out of the sacks.

Q. That could be obviated that way?

A. Yes, sir.

Q. For how long?

A. I would not expect to say; 3 or 4 weeks.

Mr. HUTTON.—Q. How many pounds of potatoes are there in a sack?

A. They vary, anywhere from 125 to 140. [106—52]

Q. Have you any knowledge of the method the Alaska Packers carry on their provisions as to potatoes?

A. They buy the same grade of potatoes that everybody else does that ships up there; they all buy the very best, because the very best of them will probably give them more or less trouble before they return.

Q. Personally you do not know that?

(Testimony of David Davis.)

A. Personally, I do not know just exactly what the Alaska Packers buy, because I never did any purchasing of potatoes for them.

Mr. HUTTON.—That is all.

[**Testimony of Peter M. Nelson, for Respondent.**]

PETER M. NELSON, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Are you the “P. M. Nelson” who is made a defendant in this case?

A. Yes, sir.

Q. Did you send the two schooners “C. A. Thayer” and “Roy Somers” to Alaska on a fishing expedition last year? A. Yes, sir.

Q. Which of the two vessels did you own?

A. I owned the “C. A. Thayer”; the “Roy Somers” I chartered.

Q. From whom did you charter the “Roy Somers”?

A. From a man by the name of Tietzen; I do not know his initials, but his name is Tietzen.

Q. Those vessels were sent north by you to catch salmon in Bristol Bay, in the waters that run into Bristol Bay? A. Yes, sir.

Q. And salt them down and then bring the salted salmon back to San Francisco? A. Yes, sir.

Q. How large a vessel is this “Roy Somers”?

A. How many tons, I could not tell you.

Q. About how many?

A. A vessel about 300 tons; that is rough. [107—

(Testimony of Peter M. Nelson.)

Q. Had you ever chartered her before for this business?

A. That was the first year I chartered her.

Q. That was the first year you chartered her?

A. Yes, sir.

Q. Who was the master of her?

A. Captain Soland.

Q. When you came to take the vessel in the spring of the year to send her to Alaska, who attended to the purchasing of the provisions?

A. I attended to that myself.

Q. From whom did you largely purchase your provisions?

Q. Practically all from Dodge-Sweeney & Company.

Q. How long had you been engaged in sending fishing vessels to Alaska in a similar business as this?

A. My own private concern, since 1882.

Q. And how long have you been engaged in fishing up there?

A. I have been going, I have been engaged and going to Alaska every summer straight, since 1885.

Q. What can you say as to the character of the provisions which you purchased for the "Roy Somers"?

A. I can say nothing else but that I tried to *best* that money could buy and to buy enough, as we always have done, and the two vessels were fitted out practically alike.

Q. Do you know what water-tanks the "Roy

(Testimony of Peter M. Nelson.)

Somers'' has in her?

A. Well, she had a big tank in the hold that would hold about 1,000 gallons, and then she had a cask right in front of the cabin that would hold about 150 gallons I am not sure, but somewhere around that; and then we had 4 or 5 or 6, I cannot remember just exactly, casks that came from Willard Brothers; and had them scrubbed out; coming back we had 1340 gallons of real good water in barrels, and them casks were for washing purposes and other uses; for the men in the morning to wash their face and hands.

Q. The iron cask you remember carried how much? A. 1,000 gallons. [108—54]

Q. And the wooden cask on deck you said held about 150 gallons? A. Yes, sir.

Q. In December you bought some other casks from Willard Brothers? A. Yes, sir.

Q. And put those in the hold of the vessel?

A. On deck.

Q. Did you have them filled?

A. They were filled last winter in Oakland, California, scrubbed out; but they were not intended by me to be used for cooking purposes or anything of that kind because there should be enough water for cooking purposes without using them.

Q. How many of those casks did you buy?

A. 5 or 6; they held about 90 gallons apiece.

Q. When you came back from Alaska you got another cask?

A. We did not have very good water, and I had a cooper make a cask that held about 200 gallons.

(Testimony of Peter M. Nelson.)

Q. And you put that on board the vessel?

A. Coming back.

Q. And you had been using it in Alaska for drinking water?

A. Drinking water and all purposes.

Q. Where was the water obtained from in Alaska with which the tanks and casks were refilled for the return voyage?

A. The water we had in Koggiung is not very good; in Nushagak we had a fine spring, the water ran out of the ground, and before we left Alaska we take all those casks to Nushagak and took all the water there, and we pumped it from the launch, the men hoist some of the casks, but most of it is pumped, and we fill the large tank and all the casks.

Q. How far did you have to go to get this good water? A. To my estimation about 70 miles.

Q. What was the matter with the water right at Koggiung?

A. That is marsh land water; it gets stagnant. We dug a well there for our private use, but it took too much time to [109—55] pump it; it was cheaper at Nushagak, where we had a pipe running right down to the wharf, to get better water.

Q. When did you leave Alaska?

A. As near as I can remember, either the 27th or 28th of July.

Q. How did you come down?

A. In mail boat from Nushagak, as far down as Seward, and I got the Northwestern to Seattle, and from Seattle the Shasta Limited, home.

(Testimony of Peter M. Nelson.)

Q. Did you leave before the "Roy Somers" left?

A. Sure.

Q. What place is there in Alaska where provisions can be procured for your vessels?

A. The principal place is this Mittendorf store at Nushagak.

Q. How far is that from Koggiung?

A. That is about 78 or 80 miles, I should judge.

Q. Is Mr. Mittendorf here in town now?

A. Yes, sir, he is right here now.

Q. What orders, if any, did you leave for the provisioning of your vessel, the "Roy Somers" for the return voyage?

A. Before I came down in the mail boat I instructed the cook at Nushagak first while there, and then I took the launch to Koggiung and instructed the cook to make out a store list of what he needed. I went to see what he had in the storeroom, but I did not like to interfere with him. I says, "Make out a store list of what is necessary to come back on as the cook at Nushagak is doing the same thing; in a day or so he came with the store list. I asked him if he had got enough and he says, "Yes, I think this is all I need."

Q. Enough for what?

A. To come down on, to take him down on the return trip.

Q. Did you in any way restrict the amount he should order at Mittendorf so as for him to have enough to come down with?

A. Not been any consideration. [110—56]

(Testimony of Peter M. Nelson.)

Q. Who took the order over to Mittendorf?

A. I do not know; if I am not mistaken, I could not swear, but I think Captain Jacobson took it over to Mittendorf's.

Q. Did you take it over?

A. No, sir, either the engineer or Captain Jacobson.

Q. Was any restriction placed by you at Mittendorf's store of the quantity of provisions which were to be furnished to these two vessels to come back on?

A. No, sir, none; Mittendorf was instructed to fill up the whole order as it was made out.

Q. Did you ever change that order? A. Not I.

Q. Did you ever interfere with him in any way?

A. Not a thing in any way whatever.

Q. Who was Mr. Ek?

A. He was the engineer of the gasoline launch.

Q. Did you ever give Mr. Ek or Captain Jacobson any instructions to write the quantity of food that should be purchased by the cooks?

A. No, sir, that I did not.

Q. How did the provisioning of your vessel for this voyage to Alaska compare with that of other seasons?

A. Practically about the same; you take off some of one thing and you add more of another; you figure out from one year you have a little more of one and a little less of something else; you use more of one thing and less of another; that is, you use butter and milk and sugar, I took more butter and milk and

(Testimony of Peter M. Nelson.)

sugar than the year before, and I also had more potatoes.

Q. How many pigs did you take?

A. I had six pigs when I started out from San Francisco and we had three at Koggiung and three at Nushagak; the Nushagak pigs were smaller than the Koggiung pigs, the Koggiung pigs turned out better; I made Mr. Mittendorf a present of two of the small pigs at Nushagak, and [111—57] I took one pig over to Nushagak, and they had two at Koggiung.

Q. When you left Alaska to come out in July, were those two pigs still alive in Koggiung?

A. They were all alive, as far as I knew.

Q. What would be your judgment of the weight of those pigs?

A. Them Koggiung pigs were excellent pigs; one of them grew up fine, and in my judgment weighed about 250 pounds before being killed, and about 200 pounds dressed.

Q. What would you say as to the other one?

A. About 25 pounds less.

Q. Has it ever been customary on this voyage to Alaska to carry salt pork such as vessels carry on deep sea voyages?

A. They always carry more or less; you do not know how much they will take; sometimes you will be short of one thing and have more of another; if they get all they ask for that is all you can do; you naturally become short of one article and have more of another; the thing would be to give them just their

(Testimony of Peter M. Nelson.)

rations and no more, so as to be sure.

Q. Did you have the cook of the "Roy Somers" go over the list of provisions in San Francisco before the vessel sailed to see whether they were sufficient supplies for the purpose of the voyage?

A. He had all the provisions, and to go over them; in fact he was instructed to stay on board to see that he got everything he wanted; furthermore, he was instructed that if he did not have enough to let me know.

Q. What were you planning on, enough to go up or for the whole trip?

A. For the whole round trip; to go up and come back again.

Q. Is there any steamer or vessel going from Seattle or San Francisco to Koggiung in the summer-time?

A. Once a month. [112—58]

Q. And she comes from Seward?

A. Yes, sir, and connects with steamers at Seattle.

Q. Did you have any trouble in Alaska with any of these men who testified this morning?

A. I never had no trouble with them; what I call real trouble; I never had any real trouble I mean; they grumbled and kicked and were discontented; we do not find a man going to Alaska that will not do the same, but not have any serious trouble.

Q. Did you have any trouble with these men taking fish off the vessel either up there or down here?

A. It has been reported to me; may I explain that?

Q. Go ahead.

(Testimony of Peter M. Nelson.)

A. I always let every man take one-half a barrel of salmon bellies provided he asks for it; I have instructed if he did not ask to let them have it; some man decided to take some and not ask; Mr. Peterson, the gentleman who is here, took some salmon bellies going down which I did not like, as he did not ask for them; but that is all right; coming down he took some codfish barrels. Mr. Patsel did not have trouble with me; he is a young fellow, and is going to be a man; fellow that is looking for tea he can get it—that is, whiskey. A man like him ought to attend to business.

Q. Did you have trouble with him?

A. Last year he begged me to take him up.

Q. What was the trouble?

A. Discontented in all ways.

Q. What was the quarrel you had with him?

A. He used to go out with the fishermen and help them to discharge the boat, and when he came back he wanted to get extra pay; he was getting \$12 a month; he signed on for that, and I would not allow him more; I would not give him any more; I never ordered him to go in fishing, I never did that myself.

Q. Have you ever had trouble before with your fishermen in [113—59] regard to not feeding them sufficiently?

A. I do not know for sure; there is not a man born yet, you will have some fellows kicking; you cannot hire a cook to satisfy those men; they are always kicking.

Q. Did you ever have a suit brought against you?

(Testimony of Peter M. Nelson.)

A. Not me, individually, no.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. Is it not a fact that there have been complaints every year about the food on your vessels?

A. It will always be; there is no man born that could satisfy everybody.

Q. If you met the requirements of the law they could not have any kick coming?

A. If you deal them just exactly their rations and no more and no less.

Q. Is it not true that some two or three years ago the men complained and were going to sue you for shortage of food and you paid them something like \$250 or \$200 to avoid a suit?

A. I do not remember exactly; I think I was short of butter.

Q. And other things?

A. No, sir, I do not think anything else.

Q. Was there not a general complaint last year about the food on your vessel?

A. I have no record of it.

Q. How much did you pay, \$200 or \$250?

A. I do not remember exactly.

Q. It was one or the other, was it not?

A. I do not remember; it might have been one or the other.

Q. Do you remember how many years ago that was?

A. Three years ago, that there was such a thing.

(Testimony of Peter M. Nelson.)

Q. Was there not complaint made last year when the men came in and didn't they threaten to sue you?

A. I did not have complaint last year. [114—60] 60]

Q. What vessel did you go up in?

A. In the "C. A. Thayer."

Q. When you left San Francisco where were the six pigs, on the "C. A. Thayer"?

A. Three on the "Thayer" and three on the "Roy Somers."

Q. This trip was one of ordinary duration; it was not an extraordinary long trip, *as it?*

A. About as usual.

Q. And the ship got back about the same time?

A. Yes, sir.

Q. You had trouble before with potatoes going bad on your previous trips, did you not?

A. Every one of them has that; you cannot buy potatoes that is good.

Q. You knew, did you not, these potatoes were likely to go bad on you when you left San Francisco?

A. I did not know that, no.

Q. Don't you know some of the concerns fishing up there, to avoid that trouble use Australian potatoes?

A. I never knew that; I knew that that North Alaska Company was short of potatoes in July, and they did not have a potato after that, and there has been no complaint about that, and things like that.

Q. Have you taken Australian potatoes yourself?

A. I did not know of any; I knew of onions.

Q. You were not there when the food was placed

(Testimony of Peter M. Nelson.)

on the "Roy Sommers," whatever food was placed on there from Mittendorf's store?

A. I was not there.

Q. Were you in Alaska at that time, or had you left?

A. The time I was there they got it from Mittendorf's store, but they were not placed on the "Roy Somers."

Q. You went away before whatever supplies were put on board? A. Yes, sir.

Q. Your water up there is the finest kind of water?

A. Yes, sir.

Q. At the fishing station?

A. Koggiung you mean?

Q. Yes. [115—61] A. Good water.

Q. Who ordered the stores from Dodge-Sweeney & Company here? A. I ordered them myself.

Q. Do you know when you put the order in?

A. About two weeks before the ship left.

Q. The cook had nothing to do with putting the order in? A. No.

Q. As a matter of fact the order was put in before the cook was hired?

A. No, sir, he was hired before that.

Q. Before he joined the ship? A. Yes, sir.

Q. As a rule they do not join the ship until a day or so before the ship goes out?

A. I could not state the date, I always get my cook on board a few days before starting, so he can see that they have got everything that is down on the list.

Q. During the season up there while preparing for

(Testimony of Peter M. Nelson.)

fishing and during the fishing you were near Koggiung?

A. Two or three days in one place, and two or three days in another place; I was two or three days at Koggiung and two or three days at Nushagak, and then I would go back again to Koggiung.

Q. Half of the time was in each place?

A. Yes, sir.

Q. You had a store at Koggiung? A. Yes, sir.

Q. When you got to Koggiung the stores were taken off the "Roy Somers" and taken to the storeroom and kept in the storeroom there to be used on shore? A. Yes, sir.

Q. Was that done under your supervision?

A. Not under my supervision; I was not there when they were taken ashore; they had instructions from me to put the stores in the storeroom.

Q. When you returned to Koggiung and during the time you were there you at times went into the storeroom [116—62]

A. Sometimes I came over there; not every trip; once or twice a week I looked in the storeroom and sized the stores up, but I never interfered.

Q. You were the superintendent when you were there? A. When I was there.

Q. And everybody had to obey your orders, of course? A. I suppose so.

Q. What day did the cook give you that list of supplies up in Alaska?

A. You want to know the exact day?

(Testimony of Peter M. Nelson.)

Q. About how long before you left; before you personally left?

A. I should think about the 21st or 22d of July, as far as I can remember.

Q. Three or four days before you left?

A. About four days before I left.

Q. Did you yourself go into the storeroom and take the list with you and check it up?

A. I did not check anything in the storeroom; I did not take no stock; I only wanted the cook to get what he wanted, and to be sure to get enough.

Q. You never examined it yourself to ascertain whether the list was corect, or not?

A. I did not interfere with the cook; I wanted him to have all he wanted, so he would have enough.

Q. I am simply asking you if you went into the storeroom to ascertain what you had there and took the cook's list with you and checked it up?

A. I did not check up anything in the storeroom; I told the cook to get whatever he needed, whatever was necessary.

Q. You did not examine the list when the cook gave it to you, to see whether you had enough?

A. I left that to the cook to get enough; I told him to get enough.

Q. You arrived in San Francisco before the "Roy Somers," did you not, sometime?

A. Yes, sir, about a week.

Q. What was the total water capacity of the vessel? [117—63]

A. I am not sure, but there was over 1300 gallons

(Testimony of Peter M. Nelson.)

of the best kind of water, and six or 700 gallons poor water for washing purposes, as near as I know; the captain can state that.

Q. You had from 1900 to 2,000 gallons of water in the tanks and barrels, when they were full?

A. Yes, sir.

Q. Have you any idea of what capacity the big tank has on the "Roy Somers"?

A. About 1,000 gallons.

Q. Did you ever measure it?

A. No, sir, that is the captain of the ship said so; he is the master of her four years.

Q. And your barrel capacity was that?

A. 150 to 200 gallons absolutely first class water.

Q. How many barrels had you? Five or six?

A. I am not sure, either five or six.

Q. And the capacity of each barrel was how much?

A. 90 gallons.

Q. You say there were six, that would be 540 gallons? A. Yes, sir.

Q. And with that 1000 gallons it made 1540?

A. There was one cask of 150 gallons.

Q. 1540 gallons and one cask of 150 would make 1690 gallons; that was her capacity?

The COURT.—He says he had another one of 200 gallons; it would be 1890.

A. Somewhere around that neighborhood.

Q. That was practically the capacity of the vessel?

A. Yes, sir.

Q. Was any complaint made to you when the "Roy Somers" arrived in Alaska, about there being

(Testimony of Peter M. Nelson.)

a shortage of water? A. No, sir.

Q. The “Roy Somers” had been used as a lumber vessel during her whole career, prior to that trip, had she not? A. Yes, sir.

Q. Carrying lumber from Gray’s Habor down here?

A. I do not know where she had carried the lumber from; I could not tell you.

Mr. HUTTON.—That is all. [118—64]

The COURT.—Q. Did the mail boat carry any freight? A. I think she did.

Mr. HUTTON.—Q. Do you know what date the “Roy Somers” arrived there?

A. In Alaska?

Q. Yes.

A. I could not say that. Captain Soland knows, and he can tell you when he gets on the stand.

Q. Do you know what day she left San Francisco?

A. The 22d—do you mean for Alaska?

Q. Yes. A. The 22d of April.

Q. Did you leave after that or before?

A. I left the day after her in the “C. A. Thayer.”

Q. And you arrived in Alaska before she did?

A. Just about the same day, just the same day practically.

Mr. HUTTON.—That is all.

[Testimony of L. Soland, for Respondent.]

L. SOLAND, called for the respondent sworn.

Mr. CAMPBELL.—Q. You are Master of the schooner “Roy Somers”?

Q. How long have you been master of that vessel,

(Testimony of L. Soland.)

Captain? A. A little more than 17 years.

Q. Coasting trade on this coast?

A. Coasting trade and once to Mexico and once to Honolulu.

Q. With what water-tanks was the "Roy Somers" permanently fitted? A. For Alaska?

Q. As she was used in the coasting trade?

A. Well, she had an end tank that would hold 1000 gallons, which was in the hold; and then she had casks on deck, that would hold 150 or 175 gallons.

Q. How about that tank and cask being there all the time you were master of her?

A. No, sir, I got a new tank about eight [119—65] years ago.

Q. From the time that iron tank was put in her and the casks put on her, for what purpose was the water used which was carried?

A. Used for eating and drinking.

Q. Did you ever find the water in the iron tank or in the casks on deck to have been tainted at all, or was it good water? A. It was good water.

The COURT.—It is conceded here that the water in the tank and casks was good water.

Mr. CAMPBELL.—Q. What extra casks did Mr. Nelson put on board?

A. He brought on *about* big casks, that held 150 gallons apiece, I should judge.

Q. He had eight casks put on that held 150 gallons apiece? A. Yes, sir.

Q. When you came to come back from Alaska did he put on another extra cask besides the eight?

(Testimony of L. Soland.)

A. Yes, sir, he put on another cask besides the eight.

Q. How long would you say that extra cask was?

A. In the neighborhood of 100 gallons.

Q. Was any complaint made to you about the water, going up? A. Not going up, no.

Q. When you came to get ready to come down to San Francisco what was done towards refilling these casks with fresh water?

A. They were taken away from Koggiung over to Nushagak, cleaned there and refilled again.

Q. Was the iron cask refilled?

A. The iron cask was refilled; that was filled again from my casks that was brought from Nushagak.

Q. Why did you go to Nushagak for water instead of getting it at Koggiung?

A. We considered it was the best water we could get.

The COURT.—Mr. Nelson said it was cheaper.
[120—66]

A. He had a spring running over to the waterfront.

Mr. CAMPBELL.—Q. Was there any complaint made to you about the water coming down and if so what did you do?

A. A couple of times they complained that the tea was bad.

Q. Where was the cook taking that water from?

A. That is more than I know; it must have come from some of those casks on deck.

Q. What did you do when the complaint was made?

(Testimony of L. Soland.)

A. I told him to take it from the casks on deck.

Q. Weren't you using the water in the iron tank?

A. That commenced being bad, and we wanted to use the other as long as possible so as not to be short.

Q. How many days were you on the voyage coming down? A. 29.

Q. How many men were there on board the vessel?

A. 26.

Q. Did you have any water left in the iron tank when you reached here?

A. In the neighborhood of 75 gallons.

Mr. HUTTON.—Q. When you got in?

A. Yes, sir.

Mr. CAMPBELL.—Q. Now, as to the feeding of the men, was there any difference in the character of the food which was given to the sailors in the fore-castle and that which the men were eating in the cabin? A. Not that I know of.

Q. Who ate in the cabin aft?

A. The three mates, the cooper, beach boss and the cabin boy and myself, certain men.

Q. Did you hear any complaint about the food?

A. Not especially to me, but I heard some kicking going on between themselves, but not exactly made any kick to me about it.

Q. Did any of these men who were on the stand this morning come and make complaint to you that they did not have sufficient food? A. No, sir.

Q. Did anyone come to you and claim they did not have sufficient food? A. No, sir. [121—67]

Q. Did anyone come to you and complain about

(Testimony of L. Soland.)

the way the food was being cooked by the cook?

A. They were all complaining the grub was not good enough, they were kicking about the cook.

Q. Do you know when these pigs that you had at Koggiung, do you know when they were killed?

A. Yes, sir, one was killed two or three days before we left there.

Q. When was the other one killed?

A. The other one was killed 5 or 6 days, something like that, after we left there.

Q. Do you know what the combined weight of the two pigs was?

A. No, sir, I do not; I consider one was about 200 pounds, and the other between 150 and 175.

Q. What was done with the pork? Was it salted down?

A. Part was salted down and part given as fresh meat.

Q. When you started on the first voyage did you have any pork from the first pig left?

A. Yes, sir, we had about one-half of it.

Q. Did you have any ham or bacon aboard the vessel? A. We had some bacon.

Q. Were you present during the conversation that Mr. Nelson referred to that he had between him and the cook, as to the ordering of new provisions from Mittendorff?

A. I heard Mr. Nelson mention once to the cook to get whatever he wanted from Mittendorfs.

Q. Did you hear anything said by the cook as to the quantity he had on board?

(Testimony of L. Soland.)

A. The cook told me he had thirty-five days of grub.

Q. Told you? A. Yes, sir.

Q. Was any restriction that you know of placed on the cook as to what he should order?

A. None whatever.

Q. Was there any discussion between you and the cook as to the quantity of beans that you had on board? A. No, sir. [122--68]

Q. Was there any fruit served on the vessel during the voyage down?

A. Yes, sir, there was fruit served.

Q. Did you have any prunes and dried apricots?

A. We had prunes and dried apricots some of the way.

Q. Did you have any rice aboard?

A. We had some rice, but I do not think that lasted very long.

Q. Do you recall whether you had any canned tomatoes on the voyage down? A. I cannot.

Q. Do you recall whether you had any rice?

Mr. HUTTON.—He said the rice did not last very long; he said he had some rice, but it did not last very long.

Mr. CAMPBELL.—Q. Do you recall whether you had any cheese coming down?

A. We got one big cheese, yes.

Q. Did you serve that with macaroni?

Mr. HUTTON.—It is not a substitute; the law says what these men shall get; if they do not get what the law says, it gives the substitute.

(Testimony of L. Soland.)

Mr. CAMPBELL.—Q. Did you have one big cheese coming down?

A. Yes, sir.

Q. Did you have any complaint made to you of a shortage in coffee? A. No, sir.

Q. Was there any complaint made about shortage of butter and bread?

A. We had plenty of butter and bread all the way.

Q. Did you have any flour left on your arrival here? A. About 500 pounds.

Q. What was done about serving coffee and bread to the forecastle, the members in the forecastle—how was coffee and bread and butter served on board the vessel?

A. They had coffee and bread and butter at midnight and 4 o'clock in the morning, and for breakfast and for dinner there was coffee served, for dinner too, most of the time. [123—69]

Q. Did you have any rolled oats or oatmeal aboard?

A. We had oatmeal.

Q. Did you run short of that on the last part of your trip on the way down?

A. We had it every morning coming down.

Q. Did you run short of sugar? A. No, sir.

Q. Did you run short of butter? A. No, sir.

Q. Did you have any onions left on the vessel when you arrived in San Francisco?

A. I had one dozen onions left when I arrived here.

Q. In San Francisco? A. Yes, sir.

Q. Did you run short of canned meats?

A. Well, the canned meats we ran out of, but I do

(Testimony of L. Soland.)

not think they were short of it, because there was meat cut up when we arrived here?

Q. There was meat when you arrived here?

A. Yes, sir.

Q. What canned meat was that?

A. Australian mutton.

Q. What size tin was it put up in?

A. It was put up in these 8-ounce tins, one pound tins, square tins.

Q. To whom was it served after your arrival here in San Francisco?

A. It was not served after we arrived here, but it was standing on the plate after we got in, in the pantry.

Q. Was there any tapioca left on the vessel when she arrived here? A. Yes, sir.

Q. How much?

A. Between 10 and 20 pounds, something like that—20 or 25 pounds, I could not say.

Q. Have you made up a list in the last few days of the quantity of food that is still on board the vessel left over from last year's voyage?

A. Yes, sir, I did.

Q. Have you been using out of this food during this winter? A. Yes, sir. [124—70]

Q. Does this list include anything that was added to the food left there from last fall?

A. It includes only what was left there.

Q. How much rye flour did you have?

A. 200 pounds.

Q. How much tapioca? A. 25 pounds.

(Testimony of L. Soland.)

Q. How much pearl barley? A. 25 pounds.

Q. Was that on the vessel coming down?

A. Yes, sir.

Q. You had 300 pounds of white flour?

A. Yes, sir.

Q. How many pounds of sago was left on the vessel? A. 25 pounds.

Q. How much corned beef? A. 40 pounds.

Q. How much butter? A. Nine squares.

Q. How many pounds are there to a square?

A. 2 pounds to a square.

Q. Was there any tomato catsup left there?

A. Yes, sir, two bottles.

Q. Was there any Worcestershire Sauce?

A. Yes, sir, two bottles.

Q. Did you have any pepper?

A. One pound of pepper.

Q. Any allspice? A. One pound.

Q. Any cayenne pepper. A. One pound.

Q. Any baking powder?

A. Three pounds, six tins.

Q. What can you say as to whether or not the provisions that were furnished the crew on your vessel on this voyage were of sufficient quantity and quality as compared with the usual provisions for vessels engaged in the American coasting trade?

A. They were all good provisions.

Q. What can you say as to the quality of them, whether or not they were good provisions?

A. They were good provisions.

Q. What can you say as to the quantity,—what in

(Testimony of L. Soland.)

your judgment can you say as to their quantity?
Did you run short of provisions? [125—71]

A. We were not short of anything to speak of; we were short of a few small things like tomatoes and canned fruit.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. When was it the cook told you that he had 35 days' food?

A. The day before we left Alaska.

Q. Did he tell you that he had 35 days of every article of food, or 35 days' food?

A. He had sufficient provisions for 35 days.

Q. You had an ordinary trip, didn't you?

A. An ordinary trip, yes.

Q. You ran pretty close, having only three days' water when you came in?

A. Well, the water was wasted a great deal.

Q. You had a water-tender, did you not?

A. There was a man in charge of it, yes.

Q. You personally had not anything to do with the water, or the replacing of stores in Alaska, had you?
A. Not in the least.

Q. Who had charge of that?

A. Between the cook and Mr. Nelson.

Q. Did Captain Jacobson have anything to do with it?
A. He made out a list, I understand.

Q. Captain Jacobson or Captain Nelson did the ordering, didn't they, one or the other?

A. Yes, sir.

Q. And who took the supplies aboard your ship?

(Testimony of L. Soland.)

A. They were taken aboard mostly by the fishermen.

Q. How did they get down to your vessel?

A. They were brought down on the steam launch.

Q. Did you see it brought down?

A. I saw it brought down, yes.

Q. Did the cook talk to you then about it?

A. No, sir.

Q. Did he say anything?

A. Nothing. [126—72]

Q. Did you ask him whether he had enough of each article? A. No, sir.

Q. You knew you did not have some of this food aboard, didn't you?

A. I did not pay any attention to it.

Q. Your staple articles of food on the way down were bread, salt fish and beans, was it not?

A. That was the principal thing, yes.

Q. Did you have any molasses?

A. There was a gallon of molasses on board there.

Q. Was there any served on the way down?

A. I do not think so.

Q. Did you ever go forward to see what the men got to eat? A. I never did, no.

Mr. HUTTON.—That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. Was that molasses on board coming down?

A. Yes, sir, I have got a gallon of molasses on board there now.

(Testimony of L. Soland.)

The COURT.—Q. Why should any of the water be bad?

A. That is more than I can account for; them barrels there—there must have been something in them barrels before they were bought that altered the water, and it turned bad, but we had plenty of good water for cooking and drinking.

Mr. HUTTON.—Q. It did not go bad in the same barrel going up north, did it?

A. I do not know; we had good water going up; we used them casks going up.

Q. It was in the same barrel? A. Yes, sir.

Q. And the water you got from the well in Koggiung was good water? A. Yes, sir.

Q. And it was only the water that came from Nushagak that was bad?

A. Some of that and some of them casks; some of them casks was good water, and I had between 11 and 12 gallons of extra good [127—73] water there that belongs to the ship.

Mr. CAMPBELL.—Q. As I understand it, the water that was put in the iron tank also came from Nushagak? A. Yes, sir.

Q. Did that turn bad coming down?

A. No, sir.

Q. How did that water compare with the water you got at Koggiung? Was it as good as that, or not?

A. It was the best water we could get; the best water we got from Nushagak; that water that came

(Testimony of L. Soland.)

from Nushagak beat the water we got from Koggiung.

Q. From Nushagak? A. Yes, sir.

Q. And it was piped down from the spring in iron pipes? A. Yes, sir, and a wooden pipe.

Q. In your judgment was it as good or as bad as the water that came out of the well at Koggiung?

A. It is better.

Mr. HUTTON.—Q. What was the matter with the water at Koggiung?

A. Nothing, practically the matter with it.

Q. I thought I understood you to say a little while ago that you filled up the iron tank out of the barrels and then sent the barrels to Nushagak to get filled?

A. They were first taken over to Nushagak and filled, and then they were brought over in the schooner and filled in the iron tank.

Q. Did that water turn bad? A. No, sir.

Q. It did not? A. No, sir, it did not.

Q. Did you ever go up to Nushagak?

A. Yes, sir, I was up there, not on that trip.

Q. When were you up there?

A. I was up there just before the fishing season started.

Q. How much bad water did you have aboard?

A. Well, I could not say; 5 or 600 gallons.

Q. And you used all of that?

A. That was used for washing things with. [128

—74]

Q. For cooking?

(Testimony of L. Soland.)

A. It was not used for cooking, not that I know of; they complained the tea was bad twice.

Mr. HUTTON.—Q. The men did complain to you twice; you do not know how many times it was bad?

A. Twice in the tea they complained, that the tea was bad.

Mr. CAMPBELL.—Q. Who made that complaint, the sailors, or the men who were eating in the same place that you were there?

A. The men who were eating in the same place that I was.

Mr. CAMPBELL.—That is all.

[Testimony of Ed. Nelson, for Respondent.]

ED. NELSON, called for the respondent, sworn.

Mr. CAMPBELL.—Q. What was your job on the “Roy Somers” in Alaska?

A. I did not work on the “Somers” at all; I was the cooper.

Q. And in Alaska did you put the casks together, or head up the casks which were filled with fish?

A. That I did.

Q. Which?

A. I head up the cask; the cask is all made; the barrels are all made and the head is taken out, and filled with fish, and I headed them up.

Q. Did you have anything to do with the preparing of these casks in San Francisco which were purchased by Mr. Nelson and put aboard the “Somers”?

A. Yes, sir, I did.

Q. What did you do?

A. I took the heads out, and there were two men

(Testimony of Ed. Nelson.)

working with me, and we cleaned them up, scrubbed them, and I put the heads on back again and secured them, and filled them with water, and they stood there 4 or 5 days full of fresh water, and then we dumped the water out and rescrubbed them, and I headed the barrels up again.

Q. Who assisted you in doing that?

A. I done the heading myself, and in scrubbing the barrels Anderson and Englund helped me. [129—75]

Q. When you got ready to come back from Alaska did you have anything to do with preparing the casks for the return voyage? A. No, sir.

Q. Was there any complaint made about the water going up? A. Not that I heard of.

Q. Did you go to Nushagak?

A. No, sir, I stayed in Koggiung.

Q. On the way down did you hear any complaint about the water being bad?

A. I did; there was one particular cask that had been smashed in in handling it, and the head had been damaged; there was a big bang in the head, and it was possibly smashed in, and I suppose some iron water got in the cask and that stunk considerably; that was the only one. The others was not bad; they had lots of good water.

Q. Was the water in the iron tank tainted at all?

A. No, sir, the water in the iron tank was perfectly good.

Q. How large were these casks?

A. Six of them or seven, held 90 or 92 gallons, and

(Testimony of Ed. Nelson.)

there was one that held 200 or 250, and the water-cask that lay on the schooner, that holds something like 150 or 160 gallons, and then there was some barrels we used for water-breakers on the launch, and those barrels held an extra 100 gallons, 50 gallons each; they was also full of water.

Q. Was there any time when you were compelled to drink or use tainted water on the voyage down?

A. No, sir, never; one morning I turned out and the water-tender was pumping water out of the cask, the smelling water, and I says, "What do you use that water for, we have plenty of fresh water, you do not have to use it." Instead of dumping that water out he dumps it in the barrel where the cook had his cooking water, and that is the water he made tea from, and that is when the complaint was made.

Q. Did you see the quantity of provisions before you started? A. Yes, I did. [130—76]

Q. Had the pigs been killed before leaving Koggiung?

A. We killed one pig two days before we left, a big pig weighing 175 or 200 pounds.

Q. How much do you think of that pig was left when you started?

A. We had about one-half left when we left Koggiung, and then 4 or 5 days out we had another pig that we killed, and that weighed about 250 pounds dressed, and the rest we salted, we salted some of that and ate the rest.

Q. How did you salt that down?

(Testimony of Ed. Nelson.)

A. In the big barrel; and that was used later.

Q. Did you have any beef or canned meats aboard?

A. We had all we used, all we needed according to my way of thinking.

Q. Did you have canned meat or hash on the voyage?

A. We had plenty of meat and we had some left over here.

Q. What meat was left when you arrived here?

A. Some canned mutton, Australian mutton.

Q. Did you have any corned-beef that you recall?

A. We had part of the time; the latter part, I think, the corned beef—I mean the canned corned beef was used, but we had mutton and salt corned beef.

Q. Did you have any corned beef left when you reached San Francisco?

A. I think we had. I do not know how much he had left, but there was some left.

Q. Was there any time on the voyage that there was a shortage so far as you know of meat?

A. No, sir, there was plenty of meat.

Q. Did you have all the bread and butter you wanted? A. Yes, sir.

Q. Was there a shortage of coffee?

A. The last couple of days.

Q. Were you served tea on those days?

A. In place of coffee.

Q. Was there any day on the voyage when you did not have either coffee or tea? [131—77]

A. No, sir, there was not.

(Testimony of Ed. Nelson.)

Q. Did the sailors forward in the forecastle get the same food as you had to eat in the aft part?

A. I suppose they did; I am not acquainted with that because I was not in their dining-room, but I think they served the same things forward as aft.

Q. Did you hear any complaint at all made about the food?

A. At one time the second mate complained about the tea, yes; that was the time that I refer to when he dumped that rotten water in the water barrel, and the cook made tea out of that water; that is the only thing.

Q. Were you present during any conversation in Alaska between Mr. Nelson, the owner, and the cook in the presence of Mr. Soland about the provisions of the vessel for the trip down? A. Yes, sir.

Q. What took place?

A. In our sleeping department, the cook came and handed Mr. Nelson the list that he made out, and Captain Nelson asked him if he had everything that was necessary to bring him home, and the cook says yes.

Q. Was there anything said that you recall as to your having provisions for any number of days?

A. Yes, sir, the cook stated when we left—that was after Mr. Nelson left Alaska, and the cook stated to the captain,—we were playing a game of cards in the evening and the cook said then to Captain Soland and myself that we had plenty of provisions for 35 days.

Q. Did you notice the cook throwing any food

(Testimony of Ed. Nelson.)

away overboard?

A. I noticed that there were things cooked and prepared, that was not served.

Q. What became of it?

A. Well, that I never saw, I never saw anything thrown overboard, but there was stuff prepared [132—78] and laid out, and when it was not used, off it went.

Q. Did you have any conversation with the cook before you arrived here about the beans?

A. Yes, sir, that took place after; I asked him about the provisions, whether the provisions were holding out, and the captain asked him if the provisions were holding out; he said that he had provisions enough, that he had beans for 13 days; the next night the cook says, "No more beans"; that was about 3 or 4 days before arriving in San Francisco, maybe 4 or 5 days; I don't recall exactly.

Q. Did you have any rice aboard?

A. We had some rice, yes.

Q. Did you have any pearl barley served you?

A. I think so; I do not know.

Q. Do you know whether there was any tapioca or sago? A. I do not.

Q. What was done with the flour?

A. Made bread out of it, and had buns part of the way; the latter part I think we were a little short.

Q. What can you say about the maccaroni?

A. It was fine; that was used; the last of it was used the last part of the trip, and we had some

(Testimony of Ed. Nelson.)

maccaroni the last part when there were no more beans.

Q. Did you have any bacon on the trip?

A. We had some bacon.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. The principal article of food was salt fish, was it not?

A. We had some salt fish too.

Q. You had that every meal? A. No, sir.

Q. You had it every day?

A. Every day, yes.

Q. Do you know whether any canned meat was served?

A. There was no more on Wednesday prior to the day they arrived. [133—79]

Q. The vessel got here on Monday, didn't she?

A. I think it was Monday.

Q. Do you know whether canned meat was served out to the crew for food on Monday the week before she arrived; that is, one week prior to the day she arrived?

A. I cannot recall, but I think we had meat every day; this particular day I cannot say.

Q. As a matter of fact you do not know what the crew got to eat, do you? A. I do not.

Q. Are you any relation to Mr. Nelson?

A. No, sir, I am not.

[Testimony of Oscar Jacobson, for Respondent.]

OSCAR JACOBSON, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Were you captain of the “C. A. Thayer”? A. Yes, sir.

Q. Did you have anything to do with the making up of a list together with the cook of the “Roy Somers” for the provisions which that vessel was to have coming home? A. Yes, sir.

Q. Tell the Court all about that list?

A. He said to me, “I am not very good at writing English,” he said, so he wanted me to help him to do it; so I wrote it down and then he copied it in his own handwriting. I told him, “You had better do it and then they will think you have done it.”

Q. What list was this you were making up?

A. That was the list for the return trip from Alaska.

Q. Who told you to write that? A. The cook.

Q. Did Mr. Nelson ever tell you not to order any of the stuff on the list?

A. No, sir; many times that we ordered stuff from Mr. Mittendorf’s store, and he never knew anything about it.

Q. That is, Mr. Nelson never knew anything about it? [134—80]

A. No, sir, because the cook makes out the order, and tells us about it, and we get it from Nushagak.

Q. Was there any restriction at all places upon the quantity of food that was ordered?

A. No, sir.

(Testimony of Oscar Jacobson.)

Q. Was there any complaint made on your vessel coming down about the food? A. Mr. Hu—

Mr. HUTTON.—I do not think that is material what happened on the “Thayer.”

The COURT.—The objection is sustained.

Mr. CAMPBELL.—Q. Who took the list to Nushagak to be filled? A. I did.

Q. Was it filled? A. Yes, sir.

Q. Who brought the goods back to the “Roy Somers”? A. I did.

Q. While you were in Alaska what were you doing?

A. I was running the gasoline launch during the summer; that is, the biggest part of the time.

Q. You were captain of the gasoline launch?

A. Yes, sir.

Q. Were those goods delivered to the cook of the “Roy Somers”?

A. When we came back to the wharf at Koggiung I went up to the cook and asked him where he wanted this stuff left, what he wanted left on the wharf, and the rest that was going to be taken out to the schooner, and he came down and told me which stuff he wanted left on the wharf and what stuff he wanted taken out to the schooner.

Q. Did he check up the stuff at that time?

A. No, sir, he did not; but we went back, before we went back—I stayed around there 4 or 5 days running back and forth, and the cook said there were some peas that were short.

Q. How many days was that before the vessel sailed?

(Testimony of Oscar Jacobson.)

A. A little over a week, and then Mr. Ek—

Q. (Intg.) Who is he?

A. He is the engineer of the launch. He said to the cook, "I will try to get some" because I was [135—81] going to bring him back to Nushagak a little before the schooner left, and then one of the sailors who was along was to take the launch back again, as the launch stayed at Koggiung; we were figuring on sailing out without a boat. I was there for a few days, and then went back, and in the meantime he said he had no peas, and the engineer said he would try to get some from the "Thayer."

Q. How far was Koggiung to Nushagak?

A. About 60 miles.

Q. How far was it from Koggiung to Neusig?

A. 60 miles; it is the same distance; when you go you go up the river, so it is about the same distance.

Q. Koggiung is half way between?

A. No, sir, Neusig is on a branch river.

Q. Did you have anything to do with the getting of the water for the "Somers"?

A. We brought it over.

Q. Where did you get it?

A. We got it at Nushagak; that water comes down from the hill, into barrels; the overflow goes into the barrels, and in this instance we filled up the barrels and took them back to Koggiung, and we used our barge that we had over in Neusig, and took them over as they were bigger, and then filled them up afterwards.

Q. That is, you took the barrels belonging to the

(Testimony of Oscar Jacobson.)

“Thayer,” and filled those with water and took them to Koggiung to the “Roy Somers”?

A. Yes, sir, we had some in the barrels, and then afterwards we had to pump it from the barrels into the iron tank.

Q. On the “Somers”?

A. Yes, sir.

Q. Where did the water come from up the hill, from a well or spring?

A. From a spring.

Q. Was the water that was used on the “Thayer” the same water?

A. Yes, sir. [136—82]

Cross-examination.

Mr. HUTTON.—Q. This list that you testified to in getting stores from Mittendorff, was not the list you wrote out, was it?

A. No, sir, he copied it down afterwards from my writing.

Q. He copied it?

A. Yes, sir.

Q. Do you mean to say he told you he could not write sufficient English enough, and that you wrote it for him, and that he copied it afterwards in English?

A. Yes, sir; he asked me to write it down at his dictation, and then after that he wanted to copy it down from my writing.

Q. You wrote it in English first?

A. Yes, sir.

Q. And then he wrote it in English?

A. Yes, sir.

Q. Although he told you he could not write good enough English?

A. Can't he copy?

Q. You were sort of superintending for Mr. Nel-

(Testimony of Oscar Jacobson.)

son up there in his absence? A. No, sir.

Q. You had charge of the whole fishing station?

A. No, sir, I did not.

Q. That is, anybody who wanted anything had to go to you didn't they?

A. We were the only ones going to this place.

Q. I mean when Captain Nelson was absent you looked after things for him?

A. No, sir, not exactly; I had to bring the water out, and I did a good many things like that, and see the barrels were stowed right, but I had no authority over the fellows otherwise.

Q. You had to do the ordering? A. Yes, sir.

Q. For the stores? A. Yes, sir, I bought them.

Q. Did you ever check up to see how much was on board? A. No, sir.

Q. You never checked up to see how much went aboard of the "Roy [137—83] Somers"?

A. No, sir.

Q. Or how much he had left?

A. I was not running that schooner.

Q. But you did not do it, as a matter of fact?

A. No, sir.

The COURT.—Q. Did you look after the stores on your own vessel?

A. The beach boss looked after that.

Q. Did you pay any attention to it? A. I did.

Q. To see what provisions you had?

A. But he was doing it principally.

Q. Do I understand from you that the ship's master leaves port without knowing what provisions he has on board?

(Testimony of Carl Ek.)

A. Up in Alaska it is not the same as when you are running on the coast or anywheres else. When I am on a trip on the coast or anywheres else, then I am the boss as long as I am on board the ship, and there is nobody else who has got anything to say; when the boss goes up with me to Alaska he has more to say than I have.

Q. Independently of any boss, would you leave Alaska without sufficient provisions?

A. I speak to the cook to find out if he has enough, and he had enough.

Q. You had enough? A. Yes, sir.

[Testimony of Carl Ek, for Respondent.]

CARL EK, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Could you hear the testimony just given by Captain Jacobson about the delivering of provisions from Nushagak?

A. Yes, sir.

Q. Were you the Mr. Ek who was engineer of the launch?

A. Yes, sir, I was the engineer of the launch.

Q. Were or were not those provisions which were ordered from [138—84] Mittendorff's store delivered to the "Roy Somers"?

A. Yes, sir, they were delivered to the "Roy Somers"; some of them was delivered on the wharf and some of them was delivered on the "Roy Somers."

Q. Did you have anything to do with the bringing of water? A. Yes, sir.

Q. Were you the engineer of the launch?

(Testimony of Carl Ek.)

A. Yes, sir.

Q. Did you look after the water at all?

A. No, sir.

Q. This morning, Mr. Swanson testified that there was a shortage of provisions; is that true?

A. He told me there were certain things that he did not receive.

Q. What?

A. For instance he ordered split peas and did not receive them.

Q. How long was that before the "Roy Somers" sailed? A. About 4 days, 4 or 5 days.

Q. Was any trip made to Nushagak after that time? A. No, sir.

Q. Did you get any peas from the "Thayer"?

A. Yes, sir, the cook, Mr. Swanson, he told me to ask the other cook in the other—in the other place if he had gotten his split peas by mistake, and I asked him what he told me, and I asked him if he had any; so I got some split peas and I brought them back to Harry Swanson and he seemed to be satisfied.

Q. Did you come down on the "Somers"?

A. No, sir, I came down on the steamer "North Star" from Seattle.

Q. That is one of the Northwestern Fish Company's boats?

A. It belongs to Libby, McNeil & Libby.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. Who wrote out the quantities on the order, do you know?

(Testimony of Carl Ek.)

A. I do not. [139—85]

Q. Who did you get the order from?

A. I did not get any order.

Q. How did you come to get the stuff?

A. I was the engineer on the launch, and the launch went over to get the supplies from Nushagak, to take them to Koggiung, and I was handling the unloading.

Q. You do not know how the order got to Nushagak? A. No, sir, I do not.

Q. Who sent you up there?

A. Well, I do not know; Captain Nelson, I suppose.

Q. Captain Nelson was not there?

A. Yes, sir, he was in Nushagak that time.

Q. Who sent you over for them?

A. The launch was laying alongside, and we had to discharge it on account of the launch was going some other place.

Q. You do not know just who fixed the quantity of supplies that came from Mittendorf's store in Nushagak? A. No, sir.

Q. All you know is it was handed to you there and to take it to the "Roy Somers"? A. Yes, sir.

[Testimony of Nils Anderson, for Respondent.]

NILS ANDERSON called for the respondent, sworn.

Mr. CAMPBELL.—Q. Were you on the "Roy Somers" going up last year? A. Yes, sir.

Q. Did you have anything to do with the preparing of the water-casks in San Francisco?

(Testimony of Nils Anderson.)

A. Yes, sir.

Q. Will you tell the Court what you did?

A. We took out the heads of the casks and scrubbed them off, brushed them, and then we filled them with water and they stood a few days, and after that we dumped out that water, scrubbed them and filled them up again; there was eight casks, and they held [140—86] about 90 gallons apiece, and that water lasted for 20 days going up, without touching anything else, except the drinking water in the big tank aft.

Q. Was there anything wrong with the water?

A. The water was clear. You could taste a little bit, but not much; it was not bad.

Q. Did you have anything to do with filling the barrels and casks? A. I filled them.

Q. How did you do that?

A. We got the barrels over there at Neusig.

Q. At Neusig?

A. Yes, sir, and we filled the barrels up with water and sent them over; that water that we got in Nushagak, I do not think there is any better water in Alaska.

Q. Where did you get it from, a spring or well?

A. The water was gotten from a spring up on the hill.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. The water was bad coming down?

A. I do not know; I was not on the ship coming down.

[Testimony of John Englund, for Respondent.]

JOHN ENGLUND, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Were you a fisherman on board the “Roy Somers”?

A. No, sir, I was boss, foreman.

Q. Of the fishermen? A. Yes, sir.

Q. Did you come down on her? A. Yes, sir.

Q. What was your work as foreman?

A. I was doing all the painting and carpentering.

Q. Whereabouts did you eat,—with the sailors?

A. I eat with the cooper and mess-boy.

Q. What can you say as to whether or not there was any shortage of food on the voyage?

A. No, sir. [141—87]

Q. Was there or was there not?

A. There was not.

Q. What can you say as to the quality of food, as to its being good or bad food?

A. It was all right.

Q. Was there any day on the voyage that you were out of coffee or tea, that you know of?

A. One day.

Q. Did you have any corned beef and pork on the way down?

A. Yes, sir, we had, but at all the way down; we had beef all the way down.

Q. You had beef all the way down?

A. Yes, sir.

Q. Were you compelled to use or drink the water on the way down that was bad; did you have any

(Testimony of John Englund.)

bad water? A. No, sir.

Q. Did you notice the water was bad at any time?

A. No, sir, I did not notice it.

Q. Did you hear any complaint among the crew about the food or there being bad water, or that there was not enough of it? A. No, sir.

Q. Were you around on deck on the way down?

A. Very little.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. HUTTON.—Q. There were other things besides coffee to drink, were there not?

A. They run out all right.

Q. You run out of other things besides coffee to drink? Did you run out of rice? A. Yes, sir.

Q. Did you run out of beans? A. Yes, sir.

Q. You know that that bad water was used for cooking?

A. No, sir, I did not know it was bad water.

Q. You know you ran out of canned peas?

A. Yes, sir.

Q. You know you ran out of fruit, don't you?

A. Yes, sir, we ran out of fruit.

Mr. HUTTON.—That is all. [142—88]

[Testimony of W. H. Stirling, for Respondent.]

W. H. STIRLING, called for respondent, sworn.

Mr. CAMPBELL.—Q. Were you in the employ of Mr. A. H. Mittendorff at Nushagak, Alaska, in July of last year? A. Yes, sir.

Q. Did you receive from Captain Jacobson any order for provisions to go aboard the schooner "Roy

(Testimony of W. H. Stirling.)

Somers'' for her voyage down to San Francisco?

A. No, sir.

Q. From whom did you receive any order?

A. I merely made out the bill; I was merely Mr. Mittendorff's bookkeeper and made out the bill; I had nothing to do with the handling.

Q. Were there any provisions sold to Mr. Nelson that went to the schooner "Roy Somers" at Koggiung?

A. There was several different orders during the summer, on which we had instructions to mark in case the goods went to Koggiung, they were marked with a diamond "K" and the other goods went to Neusig; outside of that I could not state.

Q. Can you recall what the total bill was for the goods that Nelson incurred at Mittendorff's store during the summer? A. I cannot offhand.

Q. I will hand you a series of bills, and ask you whether or not these bills were made out by you?

A. All these.

Q. What can you say of these others that I hand you? A. These were made out by myself.

Q. You made those out yourself? A. Yes, sir.

Q. Do you know whether or not the goods called for in these bills were delivered to Mr. Nelson's vessels?

A. I have every reason to believe they were.

Q. Who was in the store, Mr. Mittendorff's store, at the time?

A. Mr. Mittendorff was there, and also two men that were working for him. [143—89]

(Testimony of W. H. Stirling.)

Q. Will you take these bills and point out on those the provisions that went to Koggiung, and those that went to Neusig?

A. These bills cover the bills that went to Neusig; this one covers the goods that went to Koggiung, and I do not know where the others went.

Q. I hand you the bill which you say went to Neusig, marked July 24th, and ask you whether those goods went to Koggiung. A. I do not know.

Q. Were you in the habit of making out your bills with a diamond "K" when the goods went to Koggiung? A. Those were my instructions.

Q. Were all these bills paid by Mr. Nelson?

A. They are so indorsed; there were several of them that were paid in Nushagak by draft.

Q. Is that your signature on these bills, W. H. Stirling? A. Yes, sir, that is my signature.

Mr. CAMPBELL.—I should like to offer in evidence the bill that was intended as the Koggiung bill.

Mr. HUTTON.—I do not think the witness has clearly identified them.

The COURT.—One bill he identified very clearly.

A. This is the last bill, I believe, as I remember it at any rate, for goods that Mr. Nelson ordered that were to go to Koggiung.

The COURT.—Q. What are the dates of the items marked "K"?

Mr. CAMPBELL.—There are two bills; one dated July 24th, the other July 29th.

The COURT.—Q. When did the "Somers" leave Alaska?

(Testimony of W. H. Stirling.)

A. On August 9th.

Mr. CAMPBELL.—I will recall Mr. Soland for a minute. [144—90]

[Testimony of L. Soland, for Respondent
(Recalled)].

L. SOLAND, recalled.

Mr. CAMPBELL.—Q. When did you leave Alaska? A. The 9th of August.

[Testimony of W. H. Stirling, for Respondent
(Recalled)].

W. H. STIRLING, recalled.

Mr. CAMPBELL.—I will simply offer in evidence that last bill. That is all.

(The bill is marked Respondent's Exhibit "B.")

Cross-examination.

Mr. HUTTON.—Q. What is that one?

A. I could not say.

Mr. HUTTON.—I think that is the one; it is dated July the 29th. The vessel left August 9th. The other one is too old.

Mr. CAMPBELL.—You do not know, you were not there; this does not contain the diamond "K" on it.

The WITNESS.—I do not know where this is from.

Mr. HUTTON.—Q. You do not know anything about that?

A. That I made the bill out. I do not know where the goods were going.

Q. This shows that there was a little, \$50 worth of

(Testimony of W. H. Stirling.)

food went to Koggiung about August 4th; is that correct?

Mr. CAMPBELL.—What one is that?

Mr. HUTTON.—This is the one the Court had.

The COURT.—This bill is dated July 24.

Mr. HUTTON.—This is the other one.

Mr. CAMPBELL.—This is the one the witness says he cannot identify.

Mr. HUTTON.—Q. What is the total of Mr. Nelson's bill up [145—91] there, do you know?

A. I could not say offhand. Aside from that bill I had \$1084.10. I do not know anything about that other bill.

Q. Assuming that the "K" on those bills means Koggiung, what is the total of that amount that went to Koggiung?

Mr. CAMPBELL.—That is also assuming that is a complete set of all the bills; whether or not it is, I do not know.

A. I only find this one bill marked "K"; the total of that is \$172.81. That is the only one I see marked "K."

Mr. HUTTON.—Q. Assuming that "K" means Koggiung, what is the total of that amount that went to Koggiung? A. \$172.81, I believe it was.

Q. The other was marked "Neusig"?

A. Yes, sir.

Q. Mr. Mittendorff had a pretty well supplied store up there? A. Yes, sir.

Q. That is, he had beans, rice and canned meat?

A. Yes, sir.

(Testimony of W. H. Stirling.)

Q. And beef, canned beef? A. Yes, sir.

Q. He had a large store?

A. Yes, sir. For a country place pretty good size.

Q. Does he supply much of the territory up there?

A. Pretty extensive.

Q. How large a territory?

A. There are several trading stations that he supplies, several outlying trading stations, and besides that he supplies Nushagak.

Q. All the year around? A. Yes, sir.

Q. He supplies oils and things of that kind?

A. Yes, sir.

Q. A general store? A. Yes, sir.

Q. And clothing? A. Yes, sir.

Mr. HUTTON.—That is all.

Mr. CAMPBELL.—Q. It is a trading place in Alaska? A. Yes, sir.

Mr. CAMPBELL.—That is all. [146—92]

[**Testimony of A. H. Mittendorff, for Respondent.**]

A. H. MITTENDORF, called for the respondent, sworn.

Mr. CAMPBELL.—Q. Are you the Mr. Mittendorff who has been referred to as being the owner of the store at Nushagak, Alaska? A. Yes, sir.

Q. Do you know Mr. B. M. Nelson?

A. For quite a number of years.

Q. Were you at your store in July, 1914, at the time Mr. Nelson left for the outside?

A. Just a few hours ahead of time, before he left; in fact, he was at my house.

(Testimony of A. H. Mittendorff.)

Q. How long was he at Nushagak before taking a steamer?

A. I could not tell you exactly; a few hours; six hours.

Q. During that time, or at any other time did Mr. Nelson ever place any restrictions on the quantity of provisions you were to furnish these vessels?

A. No, sir, he did not.

Q. Was any discussion had between you at that time as to the quantity of provisions which were to be furnished to the "Somers" or "Thayer"?

A. The only thing I can say is Mr. Nelson came in just a few days before he went away, he came in with Mr. Jacobson, and he informed me and Captain Jacobson, also, that in case his men were short of any provisions whatsoever, to get it from me, from my store; that is the word he left. A few days afterwards Captain Jacobson came to my store with a list. I looked the list over and I left it to one of the men there, I gave it to him and told him to make it out for Captain Jacobson, and after everything was done I came over, I says, "Have you fellows filled out Captain Jacobson's order," They said "Yes." I said "Is that all he wants?" And they put it aboard the launch and that is all I know about it.

Q. Can you testify as to whether or not this bill of goods was goods that was supplied to the schooner "Roy Somers"?

A. No, sir, I could not testify that; I can testify what I put [147—93] on board the launch.

Q. Referring to this bill, Respondent's Exhibit

(Testimony of A. H. Mittendorff.)

“B,” did Captain Jacobson ever hand you a list calling for the goods which are mentioned in this bill?

A. I cannot recall; there is all kinds of people come into my store, and I cannot tell myself; I have 4 or 5 men in my store besides quite a number of outside men and I could not tell.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—No questions.

Mr. CAMPBELL.—With the permission of the Court I will recall Captain Jacobson for a minute.

**[Testimony of Oscar Jacobson, for Respondent
(Recalled)]**

OSCAR JACOBSON, recalled.

Mr. CAMPBELL.—Q. Captain Jacobson, will you look at this bill and tell the Court whether or not you can say that the goods mentioned therein are the goods that were contained in this order which the cook gave you and which you gave to Mittendorff's store?

A. He did not get the split peas; that is what he complained to me he did not get.

Q. State whether or not the list of articles contained there is the list that the cook made out and gave you? A. Yes, sir.

Q. And who did you give the list to in the store?

A. Mr. Mittendorff.

Q. Who was just on the stand? A. Yes, sir.

Q. Did you get these goods and put them on the launch?

A. We put them on the lighter to the Neusig boat.

Q. Did you take these goods back?

(Testimony of Oscar Jacobson.)

A. Yes, sir, and when we came to Neusig we put them on the launch and took them to Koggiung.

Mr. HUTTON.—That is not a very generous bill of goods for 26 men on a voyage.

A. I was not the cook. [148—94]

Q. So you pass it all up to the cook?

A. I had nothing to do with that.

Q. Don't you know the cook is simply a person about the ship who has got to do as he is told?

A. I had the steam schooner and when I came to the place where I got the cook's order, he gave me a requisition of what he needed, and I trusted it to him that he was going to have enough to take him through to the next port.

Q. Suppose the cook had ordered \$1000 worth of stuff—

The COURT.—If he orders too much they will not stand for it, and if he orders a little they do not care.

The WITNESS.—If the order is within reason; \$1,000 would not be within reason.

Mr. CAMPBELL.—That is all the evidence we have got, if the Court please.

[Testimony of I. N. Hylen, for Libelants.]

I. N. HYLEN, called for the libelants, sworn.

Mr. HUTTON.—Q. You are familiar with this fishing business, are you not? A. Yes, sir.

Q. And you are a fisherman, and have been one a number of years? A. Yes, sir.

Q. And you have been up in Alaska fishing?

A. Yes, sir.

Q. Do you know anything about the kind of pota-

(Testimony of I. N. Hylen.)

toes usually carried by fishing vessels that go to Alaska?

A. Well, they carry all kinds; the Alaska Packers make a practice of getting new potatoes from Australian just before going to Alaska; they get them fresh.

Q. Dug after the winter months? A. Yes, sir.

Q. There has been more or less trouble with potatoes going to Alaska?

A. There has been shortages of potatoes. [149—95]

Q. Do you know of any concerns that do that besides the Alaska Packers?

A. I do not know any other than them.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. You never have been on one of the Alaska Packers' vessels to Alaska, have you? A. Yes, sir.

Q. Since they have been using Australian potatoes?

A. Not since they have been using Australian potatoes.

Q. So you have no knowledge yourself as to how long the Australian potatoes keep, or as to how they compare with the potatoes grown in this country?

A. Only that I have been told.

Q. They are even experimenting now with carrying the potatoes? A. Yes, sir.

Mr. CAMPBELL.—That is all.

**[Testimony of Harry Swanson, for Libelants
(Recalled in Rebuttal).]**

HARRY SWANSON, recalled in rebuttal.

Mr. HUTTON.—Q. Did you tell the captain of the “Roy Somers” or anybody else that you had 35 days’ provisions on board? That is, at the time you left Alaska?

A. Not that I know of; not that I remember; I told the fishermen, they knew we were short of provisions; they knew we were short when we went to sea. I told all the same thing, “we starved to death coming down.”

Q. Who did you tell that to?

A. The fishermen.

Q. Did you tell the captain of the “Roy Somers”?

A. He know it too; he know we had very little provisions.

Q. Did you say anything to him about how many days’ food you had on board?

A. No, sir, not that I remember.

Q. Did you say anything to Captain Jacobson or anybody else about the amount of food you had on board. [150—96]

A. Some of them say we come down in 12 or 15 or 18 days, and some of them say it takes 6 or 7 weeks to get home. Everybody is happy when we come down to Frisco.

Q. When did the water first begin to get bad?

A. It got bad as soon as we came out in Bering Sea.

Q. And it stayed bad how long?

(Testimony of Harry Swanson.)

A. It stayed bad till we came to Frisco. Even the captain of the "Roy Somers" he was puking over the rail after drinking coffee; that is what he say to the wheelman; the wheelman came and told me.

Q. You saw him vomiting over the rail?

A. He was puking over the rail; he was doing it after drinking the coffee with the bad water.

Mr. HUTTON.—That is all.

Cross-examination.

Mr. CAMPBELL.—Q. Where did you get the water that you made the coffee from? Where did you get the water, out of the iron tank, from which you made the coffee?

A. Not always; there was water there; he could not get the water always from the tank, so he give me water from the rotten cask, and I had to keep it in a barrel, and I take the water from a barrel.

Q. You said that you still had water in the iron tank when you reached San Francisco?

A. Yes, sir.

Q. That was not true? A. Yes, sir.

Q. And you also said this morning that the water in the iron tank was good water? A. Yes, sir.

Q. Why were you using rotten water, as you call it, and making coffee with it, when you had good water in the iron tank?

A. I had no right to use the water in the tank. They gave me my water; I had to use what I was given. [151—97]

Q. Did you go to the captain of the ship and ask

(Testimony of Harry Swanson.)

him to give you the good water out of the iron tank?

A. No, sir, I did not; he told me always to be careful with the water; he said we have so many days out, and for me to be careful with the water, and I had to use the water they gave me.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—Q. You kept a barrel of water at the galley?

A. Yes, sir, and the water-tender he put water in there each day.

Q. You had to use the water from your own barrel that was given to you?

A. Yes, sir, there was bad water, and then maybe he give me a bucket of good water; and I would use that; I would use that for coffee or tea; when that was gone I had to use the rotten water; I could not do anything else; I had to do the best I could on that vessel; it was the worst ship I was ever on.

Mr. CAMPBELL.—Q. But you did not complain to the master?

A. What is the use of complaining; he told me I had to be careful with the water, and with the provisions, and we were starving.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—I offer the shipping articles in evidence and ask that they be marked Libelants' Exhibit No. 1.

(The papers are marked Libelants' Exhibit No. 1.)

Mr. HUTTON.—That is our case.

Mr. CAMPBELL.—We will recall Captain Soland.

[**Testimony of L. Soland, for Libelant (Recalled in Surrebuttal).**]

L. SOLAND, recalled in surrebuttal:

Mr. CAMPBELL.—Q. Mr. Swanson has just testified that you were [152—98] made sick and were vomiting over the side of the ship because of the coffee you drank; I will ask you whether or not that is true. A. I never did.

Q. Any time on that voyage did you vomit over the side?

A. I did once, when I swallowed some tobacco.

Q. Did you tell him it was due to bad water in the coffee? A. No, sir.

Q. Was it due to that? A. No, sir.

Mr. CAMPBELL.—That is all.

Mr. HUTTON.—No questions.

Testimony closed.

[Endorsed]: Filed Sep. 24, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [153—98½]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,709.

CARL PATSEL, et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Order to Enter Decree in Favor of Each Libelant for
the Sum of \$65.50.**

H. W. HUTTON, Esq., Proctor for Libelants.

D. A. McLEOD, Esq. and McCUTCHEN, OL-
NEY & WILLARD, Proctors for Respond-
ent.

Upon the evidence it is fairly clear to me that li-
belants are entitled to recover the following amounts
for failure to provide:

Water	\$14.50
Potatoes or yams.....	29.00
Rice	6.00
Onions	8.00
Beans	2.00
Salt pork	6.00

Total..... 65.50

For which sum a decree will be entered in favor of
each libelant.

May 27th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May, 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [154]

*In the District Court of the United States, in and
for the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,709.

CARL PATSEL, et al.,

Libellants,

vs.

P. M. NELSON,

Respondent.

Decree.

This cause having been heard on the pleadings and proofs, and due deliberation being had, it is now ordered adjudged and decreed, that for and on account of the matters set forth in the pleadings and shown by the proofs herein, that the libellants have and recover from the respondent for the shortage of provisions mentioned in the libel and shown by the proofs herein, the following amounts respectively :

Carle Patsel, the sum of Sixty-five and 50/100 (\$65.50) dollars.

W. Sandstrom, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Gust. Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Chas. Nelson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

A. Sandstrom, the sum of Sixty-five and 50/100 (\$65.50) dollars.

M. W. Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Peter Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Hugo Lundgren, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Harrray Swanson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

N. P. Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Gust Peterson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Charles Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

John Anderson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Knut Anderson, the sum of Sixty-five and 50/100 (\$65.50) dollars. [155]

A. Petterson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Albert Johnson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Carl Anderson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

M. Nilson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Josef Nilson, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Johan Karlsen, the sum of Sixty-five and 50/100 (\$65.50) dollars.

Together with their costs to be taxed, and interest at the rate of six per cent per annum from the date of this decree.

Dated June 7, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 7, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 6 Judg. and Decrees at page 285.
[156]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY.

CARL PATSEL, W. SANDSTREN, GUST JOHN-
SON, CHAS. NELSON, A. SANDSTRAN,
M. W. JOHNSON, PETER JOHNSON,
HUGO LUNDGREN, HARRY SWANSON,
N. P. JOHNSON, GUST PETERSON,
CHARLES JOHNSON, JOHN ANDER-
SON, KNUT ANDERSON, A. PETTER-
SON, ALBERT JOHNSON, CARL ANDER-
SON, M. NILSSON, JOSEF NILSEN, and
JOHAN KARLSEN, SIGURD J. NILS-
SON,

Libelants,

vs.

P. M. NELSON,

Respondent.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to
Libelants in Said Cause, and to H. W. Hutton,
Their Proctor:

You and each of you will please hereby take notice

that P. M. Nelson, respondent herein, hereby appeals from the final decree made and entered herein in this cause on the 7th day of June, 1915, to the next United States Circuit Court of Appeals for the Ninth Circuit to be holden in and for said circuit at the City and County of San Francisco, State of California.

Dated: San Francisco, July 13th, 1915.

IRA. A. CAMPBELL,
DUNCAN A. McLEOD,
Proctors for Respondent.

Service of the within notice of appeal and receipt of a copy is hereby admitted this 13th day of July, 1915.

H. W. HUTTON,
Proctor for Libelants.

[Endorsed]: Filed Jul. 13, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [157]

*In the United States District Court, in and for the
Northern District of California, First Division.*

IN ADMIRALTY.

CARL PATSEL, W. SANDTREN, GUST. JOHNSON, CHAS. NELSON, A. SANDSTRAN, M. W. JOHNSON, PETER JOHNSON, HUGO LUNDGREN, HARRY SWANSON, N. P. JOHNSON, GUST. PETERSON, CHARLES JOHNSON, JOHN ANDERSON, KNUT ANDERSON, A. PETTER-

SON, ALBERT JOHNSON, CARL ANDERSON, M. NILSSON, JOSEF NILSEN and JOHAN KARLSEN, SIGURD J. NILSSON,
Libelants,

vs.

P. M. NELSON,

Respondent.

Assignment of Errors.

Comes now P. M. Nelson, respondent and appellant herein and says:

That in the record, opinion, decision and final decree in said cause there is manifest and material error, and said appellant now makes, files and presents the following assignment of errors, on which he relies, to wit:

1. The District Court erred in entering the decree herein, of date the 7th day of June, 1915, ordering, adjudging and decreeing that the libelants and each of them in said cause do have and recover the sum of sixty-five and 50/100 (65.50) dollars, with interest thereon from the date of said decree, together with costs.

2. That the District Court erred in overruling respondent's exceptions to the libel herein.

3. That the District Court erred in holding and deciding that the duty rested upon respondent to provide the scale of provisions appended to Section 4612 of the Revised Statutes of the United States.

[158]

4. That the District Court erred in not holding and deciding that the only duty resting upon respondent to furnish provisions was imposed by Section

4564 of the Revised Statutes of the United States.

5. That the District Court erred in not holding and deciding that respondent complied with the duties and obligations imposed by Section 4564 of the Revised Statutes of the United States by providing a sufficient quantity of stores to last for the voyage of the “Roy Somers.”

6. That the District Court erred in holding and deciding that libelants and each of them were seamen.

7. That the District Court erred in not holding and deciding that libelants and each of them were fishermen.

8. That the District Court erred in not holding and deciding that the “Roy Somers” was a fishing vessel; and that the libelants and each of them, as fishermen, were to share in the profits of the voyage and be paid according to the season’s catch.

9. That the District Court erred in holding and deciding that said libelants and each of them were entitled to the sum of sixty-five and 50/100 (65.50) dollars.

10. That the District Court erred in holding and deciding that respondent failed to provide libelants and each of them with water, potatoes, or yams, rice, onions, beans, and salt pork.

11. That the District Court erred in holding and deciding that there was a failure to provide water, and that libelants are, and each of them is, entitled to fourteen and 50/100 (14.50) dollars, or any other sum, for the failure of respondent to provide water.

12. That the District Court erred in holding and deciding that there was a failure to provide potatoes

or yams, and that libelants are, and each of them is, entitled to twenty-nine (29.00) dollars, [159] or any other sum, for the failure of respondent to provide potatoes or yams.

13. That the District Court erred in holding and deciding that there was a failure to provide rice, and that libelants are, and each of them is, entitled to six (6.00) dollars, or any other sum, for the failure of respondent to provide rice.

14. That the District Court erred in holding and deciding that there was a failure to provide onions, and that libelants are, and each of them is, entitled to eight (8.00) dollars, or any other sum, for the failure of respondent to provide onions.

15. That the District Court erred in holding and deciding that there was a failure to provide beans, and that libelants are, and each of them is, entitled to two (2.00) dollars, or any other sum, for the failure of respondent to provide beans.

16. That the District Court erred in holding and deciding that there was a failure to provide salt pork, and that libelants are, and each of them is, entitled to six (6.00) dollars, or any other sum, for the failure of respondent to provide salt pork.

17. That the District Court erred in not holding and deciding that said respondent provided the substitute provisions provided for in the scale appended to Section 4612 of the Revised Statutes of the United States.

In order that the foregoing assignment of errors may be and appear of record, said appellant files and presents the same, and prays that such disposition

be made thereof and the whole of said cause as in accordance with the law and the Statutes of the United States in such cases made and provided, and that said appellant prays a reversal of the decree herein heretofore made and entered in the above cause and appealed from, [160] and that he may have such other and further relief as shall be meet and equitable.

DUNCAN A. McLEOD,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent and Appellant.

[Endorsed]: Filed Sep. 2, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [161]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY.

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Stipulation and Order as to Original Exhibits to be
Used on Appeal Herein.**

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto that all of the exhibits introduced in the depositions taken before the Commissioner in the above-entitled cause, and all exhibits introduced at the hearing before the above-entitled court, may be sent up to the United States

Circuit Court of Appeals for the Ninth Circuit as original exhibits for the Apostles on Appeal, and need not be printed in said Court of Appeals.

Dated; August 9th, 1915.

H. W. HUTTON,

Proctor for Libelants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

It is so ordered by the Court. Dated: August 9th, 1915.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Aug. 9, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [162]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY.

CARL PATSEL, et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

Stipulation and Order Extending Time to (September 6, 1915 to) File Apostles on Appeal.

It is hereby stipulated and agreed that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals, for the Ninth Circuit, may be extended to and including the 6th day of September, 1915;

It is further stipulated that said record shall be filed in the said Circuit Court of Appeals within said time as will cause said case to be placed upon the 1915 October term of said Circuit Court of Appeals.

H. W. HUTTON,

Proctor for Libelants.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

Pursuant to the foregoing stipulation, it is hereby ordered that the time for printing the record and docketing this cause on file in the United States Circuit Court of Appeals, for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 6th day of September, 1915.

Dated: August 9, 1915.

M. T. DOOLING,

District Judge.

[Endorsed]: Filed Aug. 9, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [163]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing 163 pages, numbered from 1 to 163, inclusive, with the accompanying exhibits, three in number (transmitted separately in their original form), contain a full, true, and correct transcript of the records and proceedings as the same now remain on file and of record in the office of the clerk of said District Court,

in the cause entitled Carl Patsel et al., Libelants, vs. P. M. Nelson, Respondent, Number 15,709; which said Apostles on Appeal are prepared pursuant to and in accordance with "Praeceptum for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of the proctors for respondent and appellant herein.

I further certify that the costs of preparing and certifying the foregoing Apostles on Appeal is the sum of Eighty-six Dollars and Thirty Cents (\$86.30) and that the same has been paid to me by the proctors for appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 25th day of September, A. D. 1915.

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT

[Ten Cent Internal Revenue Stamp. Canceled
9/25/15. C. W. C.] [164]

[Endorsed]: No. 2662. United States Circuit Court of Appeals for the Ninth Circuit. P. M. Nelson, Appellant, vs. Carl Patsel, W. Sandstren, Gust. Johnson, Chas. Nelson, A. Sandstran, M. W. Johnson, Peter Johnson, Hugo Dundgren, Harry Swanson, N. P. Johnson, Gust. Peterson, Charles Johnson, John Anderson, Knut Anderson, A. Petterson, Albert Johnson, Carl Andersson, M. Nilsson, Josef Nilsen, Johan Karlsen, Sigurd I. Nilson, Appellees.

Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 25, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Order Extending Time (to September 16, 1915) to
File Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the time for printing the record and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended to and including the 16th day of September, 1915.

Dated: September 4, 1915.

WM. W. MORROW,

Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Carl Patsel et al.,

Libelants, vs. P. M. Nelson, Respondent. Order Extending Time to File Apostles on Appeal. Filed Sep. 4, 1915. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Order Extending Time (to September 23, 1915) to
File Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the time for printing the record and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended to and including the 23d day of September, 1915.

Dated: September 15, 1915.

WM. W. MORROW,

Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Carl Patsel et al., Libelants, vs. P. M. Nelson, Respondent. Order Extending Time to File Apostles on Appeal. Filed Sep. 16, 1915. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Order Extending Time (to September 25, 1915) to
File Apostles on Appeal.**

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the time for preparing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended to and including the 25th day of September, 1915.

Dated: September 23, 1915.

WM. W. MORROW,

Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Carl Patsel et al., Libelants, vs. P. M. Nelson, Respondent. Order Extending Time to File Apostles on Appeal. Filed Sep. 23, 1915. F. D. Monckton, Clerk.

No. 2662. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Under Rule 16 Enlarging Time to Sept. 25, 1915, to File Record Thereof and to Docket Case. Re-filed Sep. 25, 1915. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

CARL PATSEL et al.,

Libelants,

vs.

P. M. NELSON,

Respondent.

**Stipulation and Order as to Original Exhibits to be
Used on Appeal.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that all of the exhibits introduced in the depositions taken before the Commissioner in the above-entitled cause, and all exhibits introduced at the hearing before the District Court, may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits for the Apostles on Appeal, and need not be printed in said Court of Appeals unless the Appellate Court otherwise orders.

Dated: 7th day of October, 1915.

H. W. HUTTON,

Proctor for Libelants.

D. A. McLEOD,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

IT IS SO ORDERED BY THE COURT.

WM. W. MORROW,

Judge.

Dated: Oct. 7, 1915.

[Endorsed]: No. 2662. United States Circuit Court of Appeals for the Ninth Circuit. Carl Patsel et al., Libelants, vs. P. M. Nelson, Respondent. Stipulation and Order as to Original Exhibits to be Used on Appeal Herein. Filed Oct. 7, 1915. F. D. Monckton, Clerk.

No. 2662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

P. M. NELSON,

Appellant,

VS.

CARL PATSEL, W. SANDSTREN, GUST. JOHNSON,
CHAS. NELSON, A. SANDSTRAN, M. W. JOHN-
SON, PETER JOHNSON, HUGO DUNDGREN,
HARRY SWANSON, N. P. JOHNSON, GUST.
PETERSON, CHARLES JOHNSON, JOHN ANDER-
SON, KNUT ANDERSON, A. PETERSON, ALBERT
JOHNSON, CARL ANDERSSON, M. NILSSON,
JOSEF NILSEN, JOHAN KARLSEN, SIGURD I.
NILSON,

Appellees.

BRIEF FOR APPELLANT.

DUNCAN A. McLEOD,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

Filed this.....day of October, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANT.

Statement of the Case.

Appellant was respondent in the court below in an action instituted by fishermen and beachmen for the recovery of the penalties imposed by Section 4568 of the Revised Statutes of the United States because of an alleged failure to provide the scale of provisions set forth in Section 4612 of the Revised Statutes.

The District Court entered a decree in favor of each of the libelants in the sum of sixty-five and 50/100 (65.50) dollars upon the theory that each of them was entitled to the maximum penalty per day for each article of food found to be short. The total of the decree penalized appellant in the sum of thirteen hundred ten and 25/100 (1310.25) dollars. The lower court found that there was a failure to provide water, potatoes or yams, rice, onions, beans and salt pork. This appeal is prosecuted from that decree.

Specifications of Error.

There are seventeen assignments of error (App. p. 194) which attack the decree of the lower court in its findings that the provisions above set forth were not provided, and particularly do they attack the decree in holding that libelants were seamen, and in not holding that appellant was not bound to furnish the scale of provisions set forth in Section 4612 of the Revised Statutes of the United States because of the fact that the libelants were fishermen, sharing in the season's catch, and the vessel upon which they were engaged as such was a fishing vessel.

We also contend that the court erred in its construction of Section 4568 of the Revised Statutes, in that it construed that section to mean that one day's penalty attached to the failure to furnish the specified amount of each article of food, it being appellant's contention that the statute means that for each day's shortage of the allowance specified by the section there shall be a

penalty of not more than fifty cents per day if the shortage is less than one-third of the specified amount, or greater, but not to exceed one dollar per day if the shortage exceeds one-third of the whole amount therein specified.

Argument.

To have this cause submitted in its proper light, we think it material for the court to understand just why a few of the libelants—the ringleaders—persuaded the rest of them to join in the charges contained in the libel now under consideration. Furthermore, we would suggest a perusal of the list of provisions set forth in the invoices of the merchants from whom appellant purchased his supplies, in order that the court may understand that he made every effort to procure wholesome provisions—the best that could be procured at that season of the year.*

In the first place, the appellant employed Swanson, one of the libelants, long before the expedition commenced, for the sole purpose of seeing that all of the provisions necessary for the season were procured. (Nelson, App. pp. 137-141.)

Swanson, in Alaska, was also told to obtain all necessary provisions. (Nelson, App. p. 143.) He thereafter prepared a list of all the provisions required. (Swanson, App. pp. 48-50; Soland, App. p. 149.) All that was ordered by him was furnished except the peas. (Swan-

* The invoices are on file in this court as original exhibits.

son, App. p. 42.) Furthermore, Swanson told the master that he had enough provisions to last for thirty-five days (E. Nelson, App. p. 162; Soland, App. p. 150) and no complaint was made by him about the provisions during the whole voyage home. (Swanson, App. p. 44.)

In this connection it is significant to note that the reason advanced by the cook for his failure to complain to the master about the provisions was because the master could do nothing to help matters. (Swanson, App. p. 44.) How this testimony can be reconciled with his action in discussing and communicating his wants to the master when making up the list of necessary provisions is difficult to understand. (Swanson, App. p. 46.)

It does seem strange that with all this alleged shortage there was no complaint made by the libelants during the entire voyage to this port. When the record is read, however, the motive for the late complaint, which ripened into the present suit, is made clear.

Two or three of the leaders had a bad quarrel with appellant concerning additional wages because of the greater percentage claimed to have been earned by catching fish. So, too, there were quarrels brought about because of the desire of some of the libelants to take fish to San Francisco in barrels. (Patsel, App. p. 119; Swanson, App. p. 41.)

These disgruntled libelants came together after the ship's arrival and persuaded several others to make demand upon appellant for the sum of five hundred (500) dollars, which demand was refused. After the fishermen made this demand, "the beachmen came into the case too." (C. A. Nelson, App. p. 108.)

A general plan was then formulated to get everything possible out of the appellant. The secretary of the fishermen's union thereupon prepared a list of the provisions claimed to have been short (C. A. Nelson, App. p. 109), to which list the witness referred in giving his testimony as to what was and was not provided.

We think that this bitter feeling is manifested throughout the entire record. It is evidenced by such answers as were given by the libelants in response to questions propounded by their proctor. For instance, Swanson, when questioned as to whether he was one of the libelants—the first question asked him—said:

“We were short of food.” (Swanson, App. p. 64.)

Charles A. Nelson was asked as to whether or not he had any beans served on the voyage down, to which he most emphatically responded:

“No, sir.” (C. A. Nelson, App. p. 104.)

That libelants had no regard for the truth is apparent from that last answer, in view of the testimony of some of the other libelants; for instance, that of Swanson (App. pp. 71-90), that beans were served twice a day upon nearly the whole voyage. Numerous other instances appear throughout the record, but no good purpose would be served by reciting each one of them.

With this setting before the court, we will take up each item found short by the trial court and attempt to point out that, with the exception of the finding of shortage of potatoes, the court erred in entering up the decree against the appellant.

Water:

The trial court found that the sum of fourteen and 50/100 dollars was due each libelant for the failure to provide water. (App. p. 189.)

The water equipment on the "Roy Somers" consisted of first an iron tank holding 1,000 gallons; second, six casks holding 90 gallons each; third, one large cask holding 200 gallons; fourth, the regular water cask that belonged to the schooner, holding 150 gallons; and fifth, four extra large barrels holding at least 50 gallons each. (Swanson, App. pp. 35-36; P. M. Nelson, App. p. 132; E. Nelson, App. pp. 159-160.) It is undisputed that the water equipment on the vessel was as above stated, and that the total quantity of water was 2054 gallons. It is also undisputed that all this cooperage contained the water used on the voyage from San Francisco to Alaska. There was no complaint as to the quantity or quality of water on the voyage to the North. The same cooperage was used on the return voyage now in question.

The testimony is indisputable in showing that just prior to leaving Alaska the cooperage was thoroughly cleansed and then filled with the purest water obtainable. In order to get this water a barge was towed to Nushagak, a place seventy miles distant from that where the schooner lay at anchor. (P. M. Nelson, App. p. 133.) When asked to compare the water at Koggiung with the water at Nushagak, Captain Soland said:

"The water at Nushagak was the best water we could get. The water that came from Nushagak beat the water we got from Koggiung." (App. pp. 156-157.)

The appellant testified that because he was not satisfied with the water at Koggiung he went to Nushagak, seventy miles distant, where he obtained a full supply of spring water with which he filled the tanks and casks aboard the vessel. He also testified that a small part of the water contained in a few of the casks was intended for washing purposes, and not for drinking or cooking. His testimony, however, is quite convincing that there was a sufficient amount of the best spring water obtainable in Alaska for drinking and cooking purposes. (App. pp. 132-133.)

There is some testimony in the record to the effect that some of the water was bad and that it was used upon one or two occasions for tea. The use of this water, which may have been tainted, when plenty of the best water obtainable was at the disposal of the men, was due no doubt to an error upon the part of the water-tender, who, upon discovering his mistake, made certain that it was not again used.

How this water became objectionable is explained by Ed Nelson. He testified:

“Q. On the way down did you hear any complaint about the water being bad?

A. I did; there was one particular cask that had been smashed in in handling it, and the head had been damaged; there was a big bang in the head, and it was possibly smashed in, and I suppose some iron water got in the cask and that stunk considerably; that was the only one. The others were not bad; they had lots of good water.

Q. Was the water in the iron tank tainted at all?

A. No, sir, the water in the iron tank was perfectly good.

Q. How large were these casks?

A. Six of them or seven, held 90 or 92 gallons, and there was one that held 200 or 250, and the water-cask that lay on the schooner, that holds something like 150 or 160 gallons, and then there was some barrels we used for water-breakers on the launch, and those barrels held an extra 100 gallons, 50 gallons each; they was also full of water.

Q. Was there any time when you were compelled to drink or use tainted water on the voyage down?

A. No, sir, never; one morning I turned out and the water-tender was pumping water out of the cask, the smelling water, and I says, 'What do you use that water for; we have plenty of fresh water; you do not have to use it.' Instead of dumping that water out he dumps it in the barrel where the cook had his cooking water, and that is the water he made tea from, and that is when the complaint was made." (App. pp. 159-160.)

The fact that plenty of the best spring water was at all times at the disposal of the men stands out very strongly. John Englund said:

"Q. Were you compelled to use or drink the water on the way down that was bad; did you have any bad water?

A. No, sir.

Q. Did you notice the water was bad at any time?

A. No, sir, I did not notice it.

Q. Did you hear any complaint among the crew about the food or there being bad water, or that there was not enough of it?

A. No, sir." (App. pp. 174-175.)

Swanson, when asked as to what kind of water the men had to drink, said:

"They had good water to drink; some of the trip coming home they had good water to drink. I do not know all; I cannot say for sure if they had good

water to drink the whole trip, but they had for some part of the trip anyway.” (App. p. 69.)

Antone Jansen, another of the libelants, testified:

“Q. The water in the big tank was all right?

A. Yes, sir.

Q. The water in the five barrels was all right?

A. And the one cask, the main tank was pretty good.

Q. That was the tank that was aft?

A. Yes, sir.

Q. Could anybody help themselves to get it?

A. Yes, sir.

Q. Anyone could help themselves to drink out of that barrel?

A. Yes, sir, they had a bucket there.” (App. pp. 115-116.)

The attention of the court is especially called to the testimony of Captain Soland and the remarks of the trial court appearing on page 146 of the Apostles, as follows:

“Q. From the time that iron tank was put in her and the casks put on her, for what purpose was the water used which was carried?

A. Used for eating and drinking.

Q. Did you ever find the water in the iron tank or in the casks on deck to have been tainted at all, or was it good water?

A. It was good water.

The COURT. It is conceded here that the water in the tank and casks was good water.”

The water in the tanks and casks there referred to and conceded to be good was not wholly consumed on the voyage home. The uncontradicted evidence shows that upon the ship's arrival in this port there still was some of that good water in the iron tank.

Captain Soland said that there were 75 gallons of it in that tank upon the ship's arrival. (Soland, App. p. 148.)

It is of course true that Swanson attempted to explain the non-use of the best water by testifying that he was only permitted to take the water furnished him by the water-tender, but how lacking in truth and in fact is that explanation is best evidenced by the testimony of another of the libelants. Antone Jansen, when asked about this concededly good water, said:

“Q. Could anybody help themselves to get it?

A. Yes, sir.

Q. Anyone could help themselves to drink out of that barrel?

A. Yes, sir, they had a bucket there.” (App. p. 116.)

It is unbelievable that with all of this pure water at the disposal of the men, water, according to the testimony, that any of them could have helped themselves to, they would persist in using the tainted water without making any form of complaint.

With these uncontradicted facts before us, it is difficult for us to understand how a finding that appellant failed to furnish sufficient water on fourteen and one-half days can be supported.

Potatoes:

The trial court found that the sum of twenty-nine dollars was due each libelant for the failure to provide potatoes. (App. p. 189.)

We admit that potatoes were not furnished to the men during the return voyage, but we do urge upon this court circumstances which, in our judgment, should

at least be taken into consideration by the court in fixing the penalty in this particular.

The statute, if applicable to this cause, required appellant to furnish a little less than 3,000 pounds of potatoes. At the commencement of the voyage appellant purchased 4,850 pounds—more than sufficient to last the whole voyage.

The appellant contends that all due care was used under the circumstances in supplying an excessive quantity of potatoes to take care of spoilage.

It appears that the potatoes were unavoidably injured, spoiled or lost, a common occurrence in Alaska. These facts should be taken into consideration, therefore, for the purpose of modifying or refusing compensation as the justice of the case required.

The trial court has seen fit to impose the maximum penalty, namely, one dollar a day for shortage of the potatoes, and it is submitted that such ruling, under the circumstances, is unjust.

Rice:

The trial court found that the sum of six dollars was due each libellant for the failure to provide rice. (App. p. 189.)

Rice, according to the statute, should have been served every Monday and Saturday—eight days on the return voyage. The statute also provides that hominy, oat-meal, cracked wheat, or tapioca, may be used as a substitute for rice.

The libel admits that rice was served on at least two days. The trial court, as before stated, found that there were six days on which appellant failed to provide rice.

The testimony of Captain Soland is uncontradicted that upon the ship's arrival here there was a large quantity of tapioca, sago, and pearl barley on board the vessel. (App. pp. 152, 153.) Tapioca, it will be remembered, is expressly made a substitute for rice.

Swanson, the cook, testified:

“That tapioca I used for tapioca was some we had; that tapioca Mr. Nelson gave me I used that,
* * * ” (App. p. 97.)

It also appears that the captain of the “Roy Somers” gave the cook some tapioca besides that which was given him by Mr. Nelson.

Furthermore, the evidence is indisputable to the effect that a large amount, to wit, ninety sacks of oatmeal, were taken on board the vessel from Mittendorf's store just prior to the commencement of the return voyage.*

The testimony of Captain Soland is conclusive in this regard. It is as follows:

“Q. Did you have any rolled oats or oatmeal aboard?

A. We had oatmeal.

Q. Did you run short of that on the last part of your trip on the way down?

A. We had it every morning coming down.”

Here, too, it is to be borne in mind that oatmeal is expressly made by the statute one of the substitutes for

* See Mittendorf's invoices, original exhibits on file in this court.

rice. How, then, can it be said that rice, or a permitted substitute, was not served six times?

It is very significant to note that when Swanson, one of the libelants, prepared the list of provisions to be supplied by Mittendorf for the return voyage he did not ask for rice. The reason, however, is apparent; he had enough rice, tapioca and oatmeal to make a trip that would last several times as long as the period of time required to make the return voyage in question.

It is submitted that the District Court erred in holding that there was a failure to provide rice, or its substitutes, for it is beyond doubt that there were large quantities of rice, tapioca and oatmeal aboard the vessel for the use of the men. There is no doubt that rice was served at least part of the trip, and it is uncontradicted that oatmeal, a permitted substitute, was served every single day during the whole trip, and that tapioca was served some of the time during the return voyage, and that some of it was aboard the vessel upon her arrival at this port.

It is clear that the libel in this regard is utterly false and that the trial court erred in holding that there was a failure to provide rice or its substitutes.

Furthermore, there were other similar foodstuffs on board, such as sago and pearl barley, and while it is of course admitted that they are not specifically mentioned in the statute as substitutes for rice, the fact that they were on board nevertheless indicates that the appellant furnished large quantities of not only those provisions

required by the statute in question, but also that he furnished the vessel with plenty of wholesome provisions.

It must be apparent to this court that the statute relied upon by the libelants as to the quantity and kind of provisions to be provided was, with the exception of the potatoes, more than complied with.

Onions:

The trial court found that the sum of eight dollars was due each libelant for the failure to provide onions. (App. p. 189.)

Swanson, one of the libelants, testified:

“I had two crates of Australian onions on leaving San Francisco.” (App. p. 51.)

When asked how many onions he ordered when leaving Alaska, he replied:

“Onions. I know we cannot get that up there, so I did not ask for that.”

Captain Soland testified that upon the ship's arrival in this port he had about one dozen onions aboard the vessel. (App. p. 151.)

Then, too, it must be borne in mind that it is difficult to keep onions in Alaska during the whole fishing season. Great care must have been exercised with the onions, because the libelants themselves admit that onions were served with the hash on the return voyage (App. pp. 72, 114, 121), while the testimony that onions were aboard the vessel upon her arrival here is so conclusive upon the point as to whether or not onions were or were not served, that we think further discussion of the matter is unnecessary.

A reference to the invoices on file as original exhibits in this court fairly shows, however, that a large quantity of canned vegetables, such as corn, was supplied the vessel and actually used on the return voyage. Furthermore, the invoices of Dodge, Sweeney & Company show that large quantities of cabbages, carrots and turnips were supplied for the expedition. The statute did not require cabbages, carrots and turnips to be included in the list of provisions, or canned corn, or any other canned vegetables, yet the invoices unmistakably establish the fact that these articles were supplied in great abundance.

These facts conclusively show that the appellant used every endeavor not only to provide the class of provisions provided for by the statute relied upon, but also used every endeavor to provide other provisions for the men far more liberally than required by that statute.

Furthermore, the onions, as well as all of the provisions, were in the care and custody of Swanson, one of the libelants. Surely he would not want for onions when he knew they were on board. There is no evidence in the record of any order forbidding their use, and we submit that it is unreasonable to suppose that in the absence of such order he would voluntarily refrain from their use.

It is respectfully submitted that there should be no recovery because of the alleged failure to provide onions.

Beans:

The lower court found that the sum of two dollars was due each libelant for the failure to provide beans.

There were eight days, according to the statute, upon which beans should have been served. The invoices, on file as original exhibits, show that a large quantity of beans were supplied the "Roy Somers" before she started on her return voyage.

At the time these beans were furnished, Swanson, the cook, had one additional sack on board. (App. p. 58.) In fact, the cook had such a quantity of beans on board that he could not remember whether he had ordered more from Mittendorf's store. (App. p. 58.)

The Mittendorf invoice shows that one hundred pounds of beans were supplied just prior to the commencement of the return voyage. The statute required that one-third of a pint be served to each man twice a week. Two hundred and eight rations of one-third pint each were required for the return voyage. There are sixty pounds of beans in one bushel. One hundred pounds of beans, therefore, will provide three hundred and twenty rations of one-third pint each.

The beans obtained from Mittendorf just prior to the commencement of the return voyage were sufficient, therefore, to supply the needs of the men for forty-five days. The return voyage lasted only twenty-nine days. In short, fifty per cent more beans than required by the statute under consideration were furnished by Mittendorf and actually used on the return voyage, but the

cook, a libelant, testified that at that time there was another sack of beans on board the vessel.

Swanson also testified that he gave the men beans twice a day, and not twice a week, as required by the statute. His testimony in that regard is so conclusive that it is here inserted.

“How many times a day did you serve those beans, three times or two times?

A. Twice a day.” (App. p. 58.)

To explain the use of beans every day upon the return voyage, Swanson said:

“A. I had to give them beans every day on the trip down when we do not have any potatoes.” (App. p. 58.)

There is not a bit of testimony to contradict the statement that far more beans than required by the statute were provided for the return voyage. On the contrary, every bit of evidence clearly establishes the fact that an abundant quantity of beans was provided. It shows that beans were served not twice a week but twice a day upon almost every day of the voyage.

We are here reminded of another incident which to our mind clearly indicates how utterly unreliable is the testimony of the libelants.

In the face of all of the foregoing evidence upon the question of the beans served during the entire voyage, C. A. Nelson, when asked the direct question as to whether or not the beans were served during that period answered:

“No, sir.” (App. 104.)

This incident alone should make this court hesitate to accept the testimony of such witnesses, particularly so when, as in this case, they club together to avenge a personal feeling between some of them and the appellant.

It is also significant to note that, while the same provisions were served throughout the vessel, the libelants, only, are here suing, and it is to be borne in mind that, even in the case of the libelants, the ringleaders had to persuade the great majority to join in a complaint which was made for the first time after the ship's arrival in this port.

Pork:

The trial court found that the sum of six dollars was due each libelant for the failure to provide pork.
(App. p. 189.)

The statute upon which libelants rely provides that upon this voyage pork should have been served on twelve days. The trial court found that there was a failure to provide pork on six days.

Swanson, one of the libelants, was asked how much salt pork he ordered from Mittendorf when preparing the list of provisions needed for the return voyage. He answered:

“I did not tell him any.” (App. p. 57.)

Later he testified that he might have served a meal of salt pork coming here. (App. p. 70.)

Again he testified as follows:

“Q. You had two pigs still living at the time you got ready to come back?

A. We had two pigs. * * *

* * * * *

Q. Did you weigh this pig?

A. No, sir, but I can take a guess—the last pig we killed weighed 200 pounds, something like that.

Q. That is, dressed?

A. Yes, sir.

Q. You killed that on the way down, didn't you?

A. We killed that up in Bering Sea when we were two or three days off.

Q. Off Koggiung or Unimak Pass?

A. Off Koggiung in Bristol Bay.

Q. You had fresh pork on board the vessel the first two or three days you were out?

A. Yes, sir.

Q. You had lots of pork on board that vessel, didn't you?

A. Yes, sir." (App. pp. 87-8.)

Captain Soland testified that they killed a pig two or three days before leaving Alaska and the other large pig was killed five or six days after the voyage began, and that when the return voyage began there still remained one-half of the first pig killed. (App. p. 149.)

Ed Nelson also testified that one pig was killed two days before leaving Alaska and that one-half of that pig remained at the commencement of the voyage. The first pig killed weighed 175 to 200 pounds. (App. p. 160.) Eighty-five or one hundred pounds of that pig was, therefore, aboard the vessel when the return voyage commenced. The second pig killed weighed 250 pounds dressed.

It is certain, therefore, that at least three hundred and fifty pounds of fresh pork were supplied and consumed as such, or salted and later consumed on the return voyage. We submit that there is no testimony to the contrary.

The appellant testified that when he left Alaska there were two pigs on the "Roy Somers," one that weighed 250 pounds and one that weighed about twenty-five pounds less. (App. p. 136.)

Carl Patsel, another of the libelants, when asked as to whether or not pork was served, said it was served

"For a few days." (App. p. 117.)

Again we have evidence of the unreliability of the evidence of these men. Axel Peterson, in the face of all the evidence upon pork, testified that he never saw any pork. (App. p. 120.)

As before pointed out, Swanson admitted that salt pork might have been served one day on the return voyage, leaving three hundred and fifty pounds of fresh pork, besides bacon, and a very large amount of corned beef, a great quantity of which remained over at the end of the return voyage, to supply the needs of twenty-six men for eleven days.

If fresh pork is served, which, according to the statute, is permitted, each man is entitled to receive one and one-half pounds. If salt pork is served, each man is entitled to one pound.

Most of the libelants admitted that fresh pork was served on two or three days, so that if we assume that fresh pork was served three days, according to the statute, only one hundred and seventeen pounds were required on board the ship. The fact is, however, that two hundred and thirty-three pounds of pork was salted and served to the men as salt pork.

It seems quite clear that, with two hundred and thirty-three pounds of salt pork on board the vessel four or five days after the "Roy Somers" commenced her voyage, the men must have been provided with the requisite amount of salt pork upon the remainder of the voyage. As testified to by Swanson, one of the libelants, there was lots of pork on board that vessel. (App. pp. 87-88.)

It is respectfully submitted that enough pork, both salt and fresh, was on board the vessel to more than comply with the terms of the statute relied upon, which fact conclusively indicates that the trial court erred in finding that there was a failure to provide pork on six days.

In concluding this portion of our argument we desire to emphasize that appellant, while in Alaska, instructed one of the libelants, Swanson, to obtain all necessary provisions for the return voyage. Swanson discussed the provisions with the master and prepared the list of necessary provisions. These provisions were under his control during the whole voyage and he could have prepared and served any of them that he might desire.

It seems highly improbable that he would refrain from using provisions that were undoubtedly on board the vessel. We say undoubtedly on board because it is conclusively established that as to some of them they were on board the vessel when she arrived in this port.

So, too, with the water. It is difficult to understand how Swanson would persist in using the worst water he could find when the best spring water obtainable,

water conceded to be the purest in Alaska, was aboard the ship, free to the use of all the men, as testified to by Antone Jansen, one of the libelants. (App. p. 115.)

It will be remembered that at least seventy-five gallons of this spring water was also aboard the vessel upon her arrival in San Francisco.

Furthermore, we desire to call the court's attention to the fact that this was not the voyage of a merchant ship in the ordinary sense, but was a fishing expedition, upon which the fishermen remained and were fed in Alaska by appellant for the entire fishing season of over four months.

In view of these facts, we feel that this court should correct the errors of the lower court here complained of.

THE APPELLEES WERE NOT SEAMEN.

The Act upon which the libelants below rested was formulated for the protection of seamen and to promote commerce. By its enactment it was intended that the American seaman should have the nourishment necessary to his particular mode of life, thereby enabling him to properly care for himself and to properly perform his work. By this means our merchant marine would prosper, with the result that our commerce would thereby be promoted.

A seaman, within the meaning of the statute, is one that is engaged as a "merchant seaman" at a seaman's wages. He is not one that shares in the profits of the cruise, or one that has his wages figured and dependent

upon the particular specie of salmon caught by him, as in the case of the libelants in this cause.*

In

Telles v. Lynde, 47 Fed. 912,

Judge Morrow, sitting in the District Court for the Northern District of California, held that one shipping on a voyage from this' port to Behring Sea and return, to engage in work similar to that of the present appellees, was not a seaman, because he was to recover compensation for his services at the rate of twenty-five (25) dollars for each 1,000 fish caught by him.

These appellees, libelants below, were not seamen engaged in the merchant seamen service; they do not ply the seas for their livelihood; upon them does not depend the success of our merchant marine; they are treated, considered and recognized as fishermen, each of them belonging to the Alaska Fishermen's Union. (Swanson, App. p. 31.) Furthermore, the whole theory of their employment was to render services as fishermen at Bristol Bay, including the work about the shore in preserving the fish caught by them, as well as in placing the fish aboard the vessel.

In fact, one of them, Hugo Lundgren, signed up in the sole capacity of a salter. (See shipping articles.) How then can it be said that libelants are seamen?

Judge De Haven, in speaking of men engaged in work identical with that under consideration, said:

"The contract, while it provides that libelants shall render some services as seamen, is not, strictly

* See shipping articles on file in this court as original exhibits.

speaking, such a contract as is contemplated by Section 4552 of the Revised Statutes. That section, as originally enacted, was only intended to relate to merchant seamen (*The Cornelia M. Kingsland* (D. C.), 25 Fed. 856); and I do not think any of the acts amendatory thereof or supplemental thereto have extended its provisions to contracts like that set out in the libel.”

Domenico v. Alaska Packers' Ass'n, 112 Fed. 554, at p. 560.

It may be urged that there is as much necessity for the statute to be held applicable to all men aboard ship without regard as to whether or not they are seamen.

The answer to this suggestion, however, is that the statute in its nature is a penal one and should be strictly construed in this particular. Furthermore, as we shall later attempt to point out, Section 4564 of the Revised Statutes of the United States affords men other than seamen adequate protection and relief.

It is respectfully submitted that the court erred in holding each of the libelants to be a seaman within the meaning of the statutes relied upon by them.

THE “ROY SOMERS” WAS A FISHING VESSEL.

This vessel was not engaged in the merchant service. She proceeded to Alaska for the sole purpose of engaging in the fishing trade. She remained in those waters during the whole fishing season, and the men aboard of her were fishing for the benefit of the appellant. (App. pp. 40 and 75; *P. M. Nelson*, p. 133.)

A fishing vessel, by the express provisions of Section 26 of the Act of December 21, 1898, Vol. 3, U. S. Compiled Statutes, 1901, page 382, is expressly excluded from the provisions of Section 4612.

It is respectfully submitted, therefore, that the court below erred in not holding the "Roy Somers" to be a fishing vessel.

Section 4612 of the Revised Statutes is not applicable to vessels engaged in the Alaska fishing trade.

The appellees contend, and they were supported in their contention by the decree of the lower court, that the schedule annexed to Section 4612 of the Revised Statutes (Volume 3, Compiled Statutes, page 3122) is applicable to them. In so holding, we think the lower court erred.

Section 4612 of the Revised Statutes of the United States provides:

"In the construction of this Title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this Title may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

That section plainly says that it is applicable to any vessel to which the provisions of Title 53 on Merchant Seamen may be applicable.

We must, therefore, determine whether or not that statute is applicable to the vessel upon which libelants shipped by referring to the provisions of Title 53 on Merchant Seamen, Volume 3, Compiled Statutes, pages 3061 to 3125.

Chapter I of Title 53 provides for the appointment and duties of shipping commissioners.

The Act of June 9, 1874, Chapter 260 Vol. 3, Compiled Statutes, page 3064, provides that none of the provisions of Chapter I, which deals with shipping commissioners,

“ * * * shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage.”

The foregoing Act was amended by the Act of June 19, 1886, Chapter 421, Vol. 3, Compiled Statutes, page 3064, so as to permit the signing by shipping commissioners of a crew in the coasting trade, provided the master so requested it.

But even though the master does request the shipping commissioners to sign up the crew in this trade, according to the Act of August 19, 1890, as amended in 1895 and 1897, Vol. 3, Compiled Statutes, page 365,

“When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or Mexico, as authorized by Section 2 of an Act approved June nineteenth, eighteen hundred and eighty-six, entitled ‘An Act to abolish certain fees for official services to American vessels, and to amend the laws relative to shipping commissioners, seamen, and owners of vessels, and for other purposes,’ an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by Sections four thousand five hundred and eleven and four thousand five hundred and twelve of the Revised Statutes, *not, however, including the sixth and eighth items of Section four thousand five hundred and eleven*; and such agreement shall be posted as provided in Section four thousand five hundred and nineteen, * * *

The sixth item of Section 4511 of the Revised Statutes, Vol. 3, Compiled Statutes, page 3069, there referred to is the scale of provisions to which appellees claim they are entitled.

In other words, whenever a crew is shipped in the coasting trade before a shipping commissioner, the shipping articles shall be the same as upon every other shipping agreement, with the exception that it is not necessary to make the scale, relied upon by appellees, a part of the shipping articles.

If, therefore, we are correct in our contention that the scale of provisions was inserted in the shipping articles in this case in direct violation of Section 4511 of the Revised Statutes, it follows that the penalties attached to the failure to provide the scale were erroneously imposed, in this case, upon appellant.

It may be urged that men engaged in the work of appellees would be without a remedy if the sixth item of Section 4511 of the Revised Statutes—the scale of provisions set forth in Section 4612 of the Revised Statutes—be held not applicable to them.

That such fear is groundless, however, is apparent when Section 4564 of the Revised Statutes is read. It provides:

“Should any master or owner of any merchant vessel of the United States neglect to provide a sufficient quantity of stores to last for a voyage of ordinary duration to the port of destination, and in consequence of such neglect the crew are compelled to accept a reduced scale, such master or owner shall be liable to a penalty as provided in Section forty-five hundred and sixty-eight of the Revised Statutes.”

Vol. 3, Compiled Statutes, page 397.

It is apparent that Section 4564 of the Revised Statutes is not applicable to this case, for it is beyond all question that a sufficient quantity of good stores were provided to last the entire voyage.

It is therefore respectfully submitted that the court erred in holding that appellant was bound to furnish the scale of provisions set forth in Section 4612 of the Revised Statutes.

THE TRIAL COURT ERRED IN IMPOSING THE MAXIMUM PENALTY PER DAY FOR EACH ARTICLE OF FOOD NOT PROVIDED.

Section 4568 of the Revised Statutes, the statute here under discussion, in part provides:

“If, during a voyage, the allowance of any of the provisions which any seaman is entitled to under Section forty-six hundred and twelve of the Revised Statutes is reduced * * *, the seaman shall receive, by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages:

“First. If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding fifty cents a day.

“Second. If his allowance is reduced by more than one-third of such quantity, a sum not exceeding one dollar a day.

“Third. In respect of bad quality, a sum not exceeding one dollar a day.

“But if it is shown to the satisfaction of the court before which the case is tried that any provisions, the allowance of which has been reduced, could not be procured or supplied in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or refuse compensation, as the justice of the case may require.”

The lower court in its opinion (App. p. 189) found that each of the libelants was entitled to receive the maximum penalty per day for each article of food found not to have been provided.

For instance, it found that there was a failure to provide rice (or any of its substitutes) upon six days. The libel alleges, and it is admitted by libelants, that rice was served on two days. (App. p. 7.) The statute only required rice to be served on eight days of the voyage. It therefore becomes evident that the court imposed

a penalty of one dollar per day for the failure to provide rice.

So with the water; the court found that it was not provided on fourteen and one-half days, and it therefore imposed a penalty of fourteen and 50/100 (14.50) dollars upon appellant.

If the lower court's theory be correct, it follows that the failure to provide more than one-third of each of the sixteen articles required to be served on each Sunday would result in a penalty of sixteen (16) dollars per day, or the allowance of sixteen (16) dollars per day to each man. We do not think the statute was intended to have such construction.

It is our contention that the proper construction of the Act is that the sum of not more than fifty cents a day for each man shall be allowed for a shortage of one-third or less of all the articles of food required to be served on any one day, and the sum of not more than one dollar per day for each man if the shortage of all the food upon any given day exceeds one-third of the amount specified.

The statute distinctly says:

“If his allowance is reduced by any quantity not exceeding one-third of the quantity specified by law, a sum not exceeding fifty cents a day.”

It seems to us that that language was intended to mean and does mean that if the whole of a seaman's allowance—the whole of the amount to which he is entitled on each day—is reduced by any quantity not

exceeding one-third of the amount specified, he shall be entitled to a sum not exceeding fifty cents per day.

It is respectfully submitted that the penalty does not become due for each article of food that may be short.

CONCLUSION.

In conclusion, we submit that this is a cause in which some of the appellees are taking advantage of a statute, never intended for them, to avenge a bitter feeling against appellant.

It is a very simple matter for a number of men to join in a libel such as the one now before the court and testify to almost any statement of facts. A shipowner is at the mercy of such men. He can do no more than produce men aboard the ship other than those suing him, and they usually are few in number because the men seeking additional money are shrewd enough to realize that it is unsafe to proceed in such a cause unless they have the great majority join together.

It is also well to note that even in this cause all of the libelants were not called to the stand. The ring-leaders testified for all of them.

It is also significant to note that appellant produced every man aboard the vessel, other than the libelants, to testify in this cause.

In view of all of the facts here presented, we feel that the decree of the lower court is erroneous in the

particulars here complained of and it should therefore be reversed.

Dated, San Francisco,
October 27, 1915.

Respectfully submitted,
DUNCAN A. McLEOD,
IRA A. CAMPBELL,
McCUTCHEEN, OLNEY & WILLARD,
Proctors for Appellant.

No. 2662

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY.

P. M. NELSON.

Appellant,

VS.

CARL PATSEL et al.

Appellees.

BRIEF FOR APPELLEES.

H. W. HUTTON,
Proctor for Appellees.

Filed this.....day of November, 1915.

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

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Appellant,

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BRIEF FOR APPELLEES.

Statement of the Case.

Appellant has been engaged in catching and salting salmon on his own account since the year 1883. He owned the schooner C. A. Thayer. In 1913, he chartered the schooner Roy Somers, which vessel had always before been used in carrying lumber, for a voyage to Koggiung, Alaska, and return to San Francisco. At Alaska all of the men on board went on shore, lived and ate there, and, when the season was over, they loaded what fish had been caught and salted, on board of the vessel, and returned to San Francisco. At Alaska the C.

A. Thayer laid at a place called Neusig; ran short of provisions and those on her went over to the Roy Somers and took food from her which they did not take back again (page 95). At about the time the vessel was expected to leave, the cook made up a list of the things he was short of, without putting any quantities on it, and handed it to appellant, the master of the C. A. Thayer who seems to have had charge of the affairs of Nelson after he had left (page 169). He admits he did the ordering but did not check up to see what was on board either vessel. Captain Soland, master of the Roy Somers, testified (page 155) that he did not pay attention to the food. The result was that the vessel was short of most of the articles of food prescribed by Sec. 4512 Revised Statutes. The staple articles on the vessel on the way down being bread, salt, fish and beans, and even the beans gave out.

Testimony of Soland, master of the Roy Somers, page 155.

“Q. Your staple articles of food on the way down were bread, salt fish and beans, was it not?

A. That was the principal thing, yes.”

Nelson testified (page 138) that he did not know for sure whether he had ever had trouble before in regard to not feeding his men sufficiently. On page 139, he testified that two or three years before he paid either \$200.00 or \$250.00 to avoid a suit.

Upon the arrival of the vessel, 21 of her crew filed a libel in which they claimed, with respect to

the homeward voyage, that the water used for cooking was bad; that they had no salt pork for 12 days when it should have been served out to them; that no potatoes or yams were served at all; that no canned tomatoes were served; that no peas were served; that no beans were served for two days when they should have been served; that rice was served on but two days; that no fruit was served for 25 days; that neither onions or pickles or mustard was served out; that no dried fruit was served out; that no canned meat was served for Wednesdays or the last Sunday, and that no substitutes were given for any of the deficient articles (pages 6 and 7). The court allowed compensation for water, potatoes, rice, onions, beans and salt pork (page 199), a total of \$65.50 to each libellant.

Argument.

I.

The reply to appellant's brief, and our argument, will, for the purposes of brevity, be combined herein, and, taking up what first appears in appellant's brief, we respectfully submit that, if the testimony was to the effect that appellant hired Swanson to procure provisions, and Swanson failed to do so, that would not exonerate appellant. The duty of observing the law rested on appellant, not on his cook. The law is very clear as to what can excuse a failure to furnish the food prescribed by the statute. It is as follows:

Revised Stat., Sec. 4568:

“If it is shown to the satisfaction of the court that any provisions the allowance of which has been reduced, could not be procured in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate quality any article becomes unfit for use and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or reduce compensation,” etc.

Nothing but inability to obtain the article of food, or its destruction by its innate quality, satisfies the statute, and even then substitutes must be given.

Appellant does not attempt to claim that he could not obtain the food, but counsel claims the cook was to blame.

On page 141, transcript, Nelson testified:

“Q. The cook had nothing to do with putting the order in?

A. No.”

Further down on the same page he testified:

“A. I could not state the date, I always get my cook on board a few days before starting, so he can see that they have got everything that is down on the list.”

The list was unquestionably the list made up by Nelson himself, as the cook testified, on page 95, that he had nothing to do with the ordering of the stores here.

From the whole testimony it appears that Nelson made out a list, handed it into Dodge, Sweeney & Co. They filled the list and the cook checked it

up to see that everything on the list was delivered. He complained about shortage of potatoes, received some more sacks; but just what was done in the line of ordering in San Francisco has to do with this case, it is difficult to see, as some of what was received here was sent to the C. A. Thayer in Alaska, and not returned. In addition to the page hereinbefore mentioned Swanson testifies, on page 47, as follows:

“A. I say, ‘I have to get that and get that’. That other fellow, that other cook, come over to me and get sugar and one thing and another. Pete Nelson, he promised to, he said, ‘I get you that back in the fall when we come down’, but I did not get it again. He tells me ‘I get it back in the fall’, and did not get it back; and when I ask Pete Nelson for anything I could hardly get it.”

Nelson’s duty to obey the law could not be shifted to some one else by him, and the fact that some of the stores obtained here were sent to the C. A. Thayer makes what occurred in San Francisco, if he could shift his duty to the cook, inconsequential.

The testimony in this case was taken before the court, Swanson, the cook, testified that he told the master he did not have food enough to make the voyage (page 35). The master testified that the cook said he had enough for 35 days on (page 155). He testified that the cook did not talk to him about the food; that he saw it come on board but paid no attention to it (page 46). Swanson testified in a deposition that Nelson would not buy anything in Alaska.

There was no quarrel between the men and Nelson that the record shows. All that appears is that some of them wanted to bring some salmon bellies down, and conversations occurred between them and Nelson about it and he allowed them to do so. As to Patsel it appears he shipped on monthly wages, was put at other duty and asked for the pay of that duty, which he had a perfect right to do.

But every witness who testified, either for the libelants or for the respondent, agree, that some of the water was bad, and the food was short; so we fail to see what the trifling differences if any—we are unable to find any of consequence—has to do with this case.

All the witnesses testified that some of the water was bad, the master of the vessel testified (page 157):

“Q. How much bad water did you have aboard?

A. Well, I could not say; 5 or 600 gallons.”

The testimony is clear that the water was under control of a water tender (Swanson, pages 68, 69, 86, 186, 187; Nelson, witness for respondent, page 160).

Swanson had to use the water that was given to him. He so testified on the above pages that, it was the duty of the appellant to furnish good water, is clear.

Sub. 3, Sec. 4568, Rev. Stat., reads:

“3. In respect to bad quality, a sum not exceeding \$1 a day.”

The fact that they had but 75 gallons left when they arrived in San Francisco (page 148) shows it was necessary to use the bad water. There were 26 men on the vessel. The statutory allowance is 1 gallon per day per man. The vessel thus had 3 gallons short of three days' allowance when she arrived. The master told Swanson frequently to be careful of the water and it appears he had good reason to do so. The bad water appears to have been used all the way down except for two days and it was within the power of the lower court to have allowed \$27.00 to each of the men on this account. It allowed \$14.50 for 29 days. We submit the amount is not exorbitant and its justice is established by uncontradicted testimony.

POTATOES.

The court allowed \$1.00 per day for shortage of potatoes. None were given on the way down and no substitutes were given.

Nelson had been going to Alaska since 1883 and he must have known his potatoes would not last (Testimony of Davis, pages 127-129):

“Q. And it was to be expected, I presume, that they would deteriorate to some extent.

A. There is no question about that. They would not keep all of them the summer through.”

On page 129 he testified that some of the firms send potatoes to the fishing stations in Alaska every 6 or 8 weeks.

The potatoes in question began to get bad shortly after the vessel left. They had been sorted just before delivery and some of them were bad and Nelson must have known they would keep going bad.

The law as to his duty is very clear.

Rev. Statutes 4568:

“If it is shown to the satisfaction of the court that any provisions, the allowance of which have been reduced, could not be procured in sufficient quantities, or were unavoidably injured or lost, or if by reason of its innate qualities any article becomes unfit for use *and that proper and equivalent substitutes were supplied in lieu thereof* * * * the court shall take such circumstances into consideration and shall modify or refuse compensation as the justice of the case may require.” (Italics are ours through this brief.)

The law is, then, that if the article itself cannot be given, the substitute must. The substitute in this case is found in Sec. 4512, Rev. Stats., as follows:

“two ounces of dessicated vegetables for one pound of potatoes or yams.”

The substitute was not given. Appellant did not show why it was not given and, the proof, however, shows that no substitute could have been on board. In view of the well-known difficulties with potatoes on trips to Alaska, a prudent master would have had a stock as substitutes on board and served them out. For a failure to do so the statutory liability attaches.

RICE.

Rice should have been served on eight days and it was served two. The claim is made that oatmeal was given as a substitute.

Corn meal is also required by the statute to be served on Sundays and Thursdays. Oat meal or cracked wheat are substitutes for corn meal. Six ounces of hominy, oat meal, or cracked wheat, or two ounces of tapioca, are substitutes for rice. It does not appear that any corn meal was served.

Whether the oat meal was given as a substitute for the corn meal, or the rice, does not appear. It is very clear that if an article of food is not served out to the men, the burden rests upon the shipowner to show that a proper and equivalent substitute was given. If the oat meal was given as a substitute for the corn meal, it would not be a substitute for rice. If given as a substitute for rice it would not be a substitute for the corn meal, and the owner has failed in this instance to show that the statutory amount of the substitute, if it was given as a substitute for rice, was given. There is nothing to show that the men were given six ounces of oat meal in lieu of rice or four ounces of oat meal in lieu of corn meal.

The complete answer, part of which appears on page 12 of appellant's brief, is as follows (page 97) :

“A. That tapioca I used for tapioca was some we had; that tapioca Mr. Nelson gave to me I used that, but the captain of the ‘Roy Somers’ he had some old tapioca that was standing since the ‘Roy Somers’ was sailing on

the coast there, so he told me, 'You can see if you can't use that,' he said to me.

Q. Could you use it?

A. The captain eat some; it was standing there, but I could not use it.

Q. Why?

A. It looks very bad, black stuff."

Rolled oats were obtained from Mittendorf—90 sacks. The size of the sacks does not appear on the invoice and they must have been small as the total bill for 90 sacks is \$2.73—3 cents per sack.

We submit there was no error in allowing \$6.00 for rice. It will be remembered that it makes no difference if the provisions are on board the vessel, if they are not supplied to the men.

ONIONS.

Each of the men were entitled to 4 ounces of onions on each Sunday, Thursday and Saturday of the voyage, or thirteen days in all. Twenty-six men would have required 80 pounds of onions. The cook had 35 onions on board when the vessel left Alaska, and none were served out on the voyage. The court could have very well allowed \$13.00 for that item to each man. There is nothing in the record to show the onions would not or did not keep; on the contrary, there was one dozen on board when the vessel arrived here, which abundantly shows that the onions would keep. Appellant's brief under the head of onions reads:

"A large quantity of canned vegetables, such as corn, was supplied the vessel and actually used on the return voyage."

Mittendorf's invoice shows 1 case of corn, of the value of \$5.00 for 26 men—less than 20 cents worth for each man on a 29-day voyage, about $\frac{2}{3}$ of a cent per day for each man furnished, and that is the only vegetable that was furnished in Alaska, and what became of it does not appear. Whether it was all served in the captain's quarters, or none of it was served at all, does not appear.

Onions and potatoes are anti-scorbutics, both valuable articles of food, and very certain to make the other rather rough food provided on board a vessel to some extent palatable. Without either and on a continuous diet of salt salmon and beans, the food would undoubtedly become very unpalatable and even revolting, the human system requiring a variable diet.

BEANS.

The statute requires beans to be served on each Monday and Wednesday. They were not served for each of one of those days, and the court allowed \$2.00 for the shortage.

Beans are not a substitute for any article of food, and the fact that an overplus was given one week, to make up for shortage of other food, would not excuse a total shortage during another week.

We submit the allowance for beans was proper.

PORK.

Salt pork should have been served on each Monday, Wednesday and Friday—twelve days in all, or 312 pounds for the voyage. There was no salt pork at all on the vessel. They had some pigs going up, two were sold or given away, one was killed just after the vessel left coming down, and produced about 200 pounds. There is some uncertain testimony about weights and other pork being left over from a pig previously killed. We suppose that was all exhausted, however, as they would not have killed the last pig until it was exhausted. Two meals of fresh pork seem to have been given out, when fresh meat is given; one and one-half pounds per man is given in lieu of salt meat. That would have consumed 78 pounds, and left 122. The cooper appears to have salted that, and it was used to flavor beans with. Each of the appellees was entitled to salt pork served as salt pork—not sprinkled in beans, for ten days of the voyage when it was not served. That would have taken 260 pounds, and as there was not one-half that amount on board, that is no doubt the reason why no pork was given.

We submit the order as to pork was correct.

All the testimony as to the quantities of pork on hand when the vessel left Alaska, however, is purely speculative. Sec. 4571, Rev. Stats., requires the master to keep scales on board and weigh the

food, but there does not seem to have been any weighing on this vessel.

The only certain testimony as to what days the food was short is that of Charles A. Nelson (page 111). All the others admit shortage, but have no very clear idea as to the number of days of shortage. His testimony as to the shortage was as follows:

Salt pork for 26 days.

No potatoes or yams for 29 days.

No canned tomatoes for 29 days.

No canned peas for 29 days.

No beans for seven days.

Rice twice on the voyage.

No coffee for two days.

No molasses for 29 days.

No fruit of any kind for 25 days.

No pickles for 29 days.

No mustard for 29 days.

No onions except what was sprinkled in the hash for 29 days.

The testimony is clear that the cook refused to specify quantities, in the list he handed Nelson in Alaska (pages 47, 48). The cook simply made up a list and handed it to Nelson. The result was that there was \$167.40 worth of food bought in Alaska for the Roy Somers, an average of 19 cents worth per day per man, and apparently \$1084.10 dollars worth for the C. A. Thayer—\$5.41 of the \$172.81 bill being for tobacco, etc.

THE APPELLEES WERE SEAMEN.

The shipping articles commence.

“It is agreed between the master and seamen or mariners of the schooner Roy Somers, now bound from the port of San Francisco, Cal., to Koggiung, Alaska, and such other Alaskan ports as the master may direct and return to San Francisco for final discharge either direct or via one or more ports on the Pacific Coast, for a period not exceeding nine calendar months.”

Some of the appellees are given so much for the run, to wit, the voyage up and down, and some are on monthly wages. The vessel carried merchandise to be used in salting salmon up to Alaska, and, after fishing was all over, she carried the product, merchandise, back to San Francisco and that is all she did do, and it will not do to say she was not engaged in commerce.

The men in question worked as seamen going up, and worked as seamen coming down.

When Congress inserted the words “fishing vessels” in the Act of 1898, it meant fishing vessels as defined, or mentioned in Secs. 4391-4394, Rev. Stats. If the men in question had been under the provisions of those sections they would have had to agree as therein specified. The act reads, in part (Sec. 4391):

“for carrying on the Bank and other cod-fisheries, or the mackerel-fishing, bound from a port of the United States to be employed in any such fishery, at sea, * * * Such agreement

shall be indorsed or countersigned by the owner of *such fishing-vessel* or his agent. * * *

4392. If any fisherman, having engaged himself for a voyage or for the fishing season on any *fishing-vessel*” * * *

In the case of *Telles v. Lynde*, the vessel was a codfishing vessel and all the fish were caught at sea and the men lived on her and was the same character of vessel mentioned in the above sections.

If this vessel had been chartered by Nelson to carry his supplies to Alaska and bring them back again, the contract being one of affreightment, she would not have been a fishing vessel. As it is she did exactly the same work, and the mere fact that it was a demise of a vessel, and not a contract of affreightment, cannot alter the character of the vessel.

The libel alleges (page 6):

“That on said voyage both to Koggiung and return the said vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to said San Francisco, and never at any time engaged in fishing.”

The answer reads (page 14):

“Respondent admits that on such voyage to Koggiung and return the vessel was used for the sole purpose of transporting libelants and supplies to said Koggiung, and bringing salted salmon from said Koggiung to San Francisco, and denied that she never at any time engaged in fishing.”

The allegation in the libel being “at any time”, was broad enough to cover the life of the vessel; it was unintentional, however, and the denial was a safe one.

On the other hand supposing Nelson had been engaged in building a steam vessel in Alaska and carried the vessel in sections up there, including the men to build the steam vessel, and when she was built the men all went back on board and sailed the vessel back to San Francisco. It would be as reasonable to call the vessel a steam vessel under that state of facts, as a fishing vessel in this.

There were two contracts in this case; one to sail the vessel up and down, and the other to do work on shore. One part of the contract is subject to the provisions of the Revised Statutes, the other is not. But, independent of that, the scale of provisions is *in the shipping agreement that the appellees signed* and Nelson was bound under his contract to furnish that scale of food even if the statutory law did not apply.

The appellees were not fishermen nor was the vessel a fishing vessel when engaged in sailing to Alaska, nor were they fishermen when sailing her back again. She was being used both ways as a carrier and never was used in any other way.

The case of *Domenico v. Alaska Packers Ass’n*, 112 Fed. 554, related entirely to what had occurred on shore. The men struck while ashore, were allowed higher pay by

the superintendent, which was refused them; they signed off, and sued for the higher pay. The question involved was whether their release prohibited them from maintaining the action. If the seaman's part of the contract had been involved there is no doubt what the decision of his Honor, Judge DeHaven, would have been. However, the case was reversed by this Honorable Court; but even the decision of Judge DeHaven holds:

“The contract, while it provides that libelants shall render some services *as seamen*.”

It would be a singular construction of the law to hold that while working as seamen, the men in question while subject to all of the obligations of seamen, were not entitled to the benefit of laws made for their protection.

The only fish they caught from the vessel were codfish, caught in spare moments and used for food. They were on the codfish banks a few days and naturally caught fish, if they could, to eat. Counsel brought that testimony in to show that if they did not have one kind of food they had another. One man said he caught some for the table (page 123).

“Q. The codfish you caught yourself?

A. Yes, sir.

Q. Nelson was not engaged in catching codfish?

A. I caught it myself; I used it on the table you know.”

**SECTION 4612 OF THE REVISED STATUTES IS APPLICABLE
TO THIS CASE.**

The Act of August 19, 1890, as amended the last time in 1897, at first excluded articles sixth, seventh and eighth from shipping articles for the coastwise trade, when signed before a shipping commissioner. When the seventh was stricken out, and it left the sixth and eighth excluded.

The later and present Act, that of December 21st, 1898, 30 Stats. at Large 755, of course supersedes all previous Acts. Sec. 4612 is to be found on page 762 and, at the foot of the scale of provisions, we find the following language:

“The foregoing scale of provisions shall be inserted in every article of agreement, and shall not be reduced by any contract except as above, and a copy of the same shall be posted in a conspicuous place in the galley and in the forecastle of each vessel.”

Of course the law now is that when seamen sign shipping articles before a shipping commissioner he must see that the food scale is inserted in the articles as it is in this case.

**THE LOWER COURT HAD THE DISCRETION TO IMPOSE THE
MAXIMUM PENALTY.**

Sec. 4568, of the Rev. Stats., commences:

“If, during a voyage, the allowance *of any* of the provisions * * * the seaman shall receive, by way of compensation for *such reduction or bad quality*, according to the time of its continuance. * * *

That language is very clear; there is no escape from it, but counsel argues that the food must be taken as a whole, not by articles. In other words that, unless the master reduced the whole of the food by the specified quantities per day, no penalty would attach.

Let us see what that would lead to.

On Sunday sixteen articles are specified. On that day the master could withhold the first five, to wit: Biscuit, flour, canned meat, fresh bread, and potatoes, and leave the men canned tomatoes, coffee, tea, sugar, molasses, dried fruit, onions, lard and butter; not having reduced the whole by one-third, he would owe the seaman fifty cents.

On Monday, there are fourteen articles, specified. The master could withhold biscuit, salt beef, and fresh bread, and leave the men potatoes, beans, rice, coffee, tea, sugar, pickles lard and butter to live on, and owe the seaman fifty cents.

All the substantial articles of food could be withheld, the men get the minor article, and at the expiration of this voyage, the total sum owing would be \$14.50; of course that might be profitable to a shipowner but would certainly be very hard on the men.

No such construction can be given to the law, no such construction has ever been given to it, and it has been before this court, and the District Court in this District, and before several other U. S. courts.

The law is mandatory in terms, it can be easily obeyed; it is inexpensive, as the food is of the rougher and cheaper kinds. It was adopted for a wise purpose, and is entitled to a place among the wisest of the laws passed by Congress. As was said by his Honor Judge Morrow in the case of *Peterson v. Cunningham*, 77 Fed. 211 (page 219):

“The statute was enacted for the benefit of our mercantile seamen. It was designed to prevent famine on board vessels at sea, and to preserve the health of the crew.”

Billings v. Bausback, 200 Fed. 523.

THE APPELLEES ARE ENTITLED TO A LARGER DECREE.

This is a new trial. The whole case is before this court just as it was before the lower court. The testimony is uncontradicted that none of the following articles of food were served out on the voyage in addition to those allowed for by his Honor Judge Dooling, to wit:

The food scale calls for canned tomatoes on each Sunday and Friday. There were five Sundays and four Fridays during the trip. No canned tomatoes were served.

Peas are required on each Tuesday and Friday. There were four Tuesdays and four Fridays during the trip, and none were served.

No coffee for two days.

No pickles, required on Mondays, Wednesdays and Fridays, there being four of each during the voyage.

There was no mustard served out at all during the voyage.

No fruit for the whole voyage; that is required on each Sunday, Tuesday and Thursday. There were five Sundays, four Tuesdays, and four Thursdays during the voyage.

On page 71 however the cook testified that all the peas were used up in two meals.

On page 93 the cook testified that he gave the men prunes one day and fruit the next, but he is evidently referring to what happened prior to the time they left Alaska.

On page 25 he testifies as to canned meat. That it appears ran out on the way down; the men were entitled to canned meat on each Sunday and Wednesday, nine days in all, each one pound. The men would require 237 pounds. On page 25 the total amount on board when the vessel left Alaska was 114 pounds, less than one-half of what was required by the statute.

Salt salmon is not a substitute for meat, or for anything else. We respectfully submit that the appellees should be allowed for the additional articles not allowed for by the lower court, and the decree then affirmed.

Dated, San Francisco,

November 3, 1915.

Respectfully,

H. W. HUTTON,
Proctor for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARIZONA COPPER ESTATE, a Corporation,
Appellant,

vs.

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District
of Arizona.

Filed

OCT 13 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARIZONA COPPER ESTATE, a Corporation,
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of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

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Attorney for Defendants Boyce. [2 *]

Plaintiffs' Bill.

*In the District Court of the United States in and for
the District of Arizona*

IN EQUITY—No. E-4. (Tucson.)

CORNELIUS C. WATTS, and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and the Unknown Heirs,
if any, of U. L. BOYCE, Deceased,

~~Defendants.~~

To the Honorable, the Judge of the District Court of
the United States, in and for the District of
Arizona:

*Page-number appearing at foot of page of certified Transcript of
Record.

Cornelius C. Watts, a citizen of the State of West Virginia, residing at Charleston in that State and Dabney C. T. Davis, Jr., a citizen of the State of West Virginia, residing at Lewisburg, in that state, brings this their bill of ~~complaint~~ against the Arizona Copper Estate, an alleged corporation, alleged to have been organized, and to exist under the laws of Arizona; C. Lawrence Boyce, W. Truxton, Boyce, and Uriel Wright Boyce, citizens of the State of Delaware, residing in the County of New Castle in that state; and the unknown heirs, if any, of U. L. Boyce, deceased, who are understood to be citizens of the State of Virginia, residing in Clark County in that state, but whose post office address is unknown to the plaintiffs.

And thereupon your orators complain and say:

1. That by an act entitled "Act to Confirm Certain Private Land Claims in the Territory of New Mexico," approved June 21, 1860, the Congress of the United States, by the sixth section thereof, enacted: [3]

"That it shall be lawful for the heirs of Luis Maria Baca who make claim to the same tract of land as is claimed by the town of Las Vegas, to select instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number; and it shall be the duty of the Surveyor General of New Mexico to make survey and location of the land so selected by the said heirs of Baca when thereunto required by them, pro-

vided, however, that the right hereby granted shall continue in force for three years from the passage of this act, and no longer.”

2. That thereafter, on June 17, 1863, pursuant to said act, the heirs duly selected and located, by a description with reference to natural objects and by courses and distances as required by the General Land Office, the following described tract of land, to wit:

“Commencing at a point one mile and a half from the base of the Salero Mountain, in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west 12 (twelve) miles, 36 (thirty-six) chains and 44 (forty-four) links; thence south 12 (twelve) miles, 36 (thirty-six) chains and 44 (forty-four) links; thence east 12 (twelve) miles, 36 (thirty-six) chains, and 44 (forty-four) links; and thence north 12 (twelve) miles, 36 (thirty-six) chains and 44 (forty-four) links, to the place of beginning, the said tract being then situated in that portion of New Mexico included by Act of Congress, approved February 24, 1863, in the Territory of Arizona, and which tract of land is now in the County of Santa Cruz, State of Arizona.”

3. That on June 17, 1863, an application was duly made on behalf of the heirs of Baca, to the Surveyor General of New Mexico, to have the land so selected and located by them, duly surveyed.

4. That on June 18, 1863, the said Surveyor General duly transmitted said application, with his ap-

proval thereof, to the Commissioner of the General Land Office of the United States, at Washington, D. C.

5. That on April 9, 1864, the said Commissioner of the General Land Office, duly approved such selection and location, and ordered the land therein described to be surveyed. [4]

6. That controversies arose between the officials of the land department and the claimants to said land, in regard, among other things, to the payment of the costs of said survey, which the said officials claimed the claimants were required by law, to deposit before the said survey should be made, and which claim the claimants denied.

7. That by reason of said controversies, the survey of said land was not made by the government until the year 1905, when the same was made by one Contzen, under a contract duly made with the Surveyor General of the Territory of Arizona, and the plat of such survey and the accompanying field notes were duly approved by the Surveyor General. on or about November 23, 1906, and forwarded to the General Land Office, where they were examined and approved.

8. That the Commissioner of the General Land Office claimed against the claimants' protest that the land department had jurisdiction at the time such survey was made to investigate and determine whether or not the character of the land selected and located, as aforesaid, by the heirs of Baca, were such as the act of June 21, 1860, authorized them to select and locate.

9. That final action by the Department of the Interior, in regard to the placing on file of the said Contzen Survey was not secured until December 5, 1908, and said decision was adverse to the claimants.

10. That thereupon an action was brought in the Supreme Court of the District of Columbia, by the then owners of said land, against James R. Garfield and Frederick Dennett, then respectively Secretary of the Interior and Commissioner of the General Land Office, to require the defendants, among other things, to place on file as muniment of claimants title, [5] and for future reference, as required by law, said Contzen survey, without any annotation, or other reference, to the alleged character of the land, and to restrain the defendants from proceeding to allow entries upon said land, as public lands of the United States.

11. That thereafter, on or about March 23, 1909, Richard A. Ballinger was substituted as defendant in the place and stead of James R. Garfield.

12. That on or about June 18, 1913, the Supreme Court of the District of Columbia, decided in favor of the plaintiffs in said suit, and ordered the said defendants to place such survey on file as muniment of plaintiffs' title and for future reference as required by law, and enjoined the defendants from further proceeding in regard to any of the entries upon said land as public land of the United States; which decision of said Supreme Court was, on appeal to the Court of Appeals for the District of Columbia, duly affirmed; and from said latter decision, an appeal was taken to the Supreme Court of the United States,

which unanimously affirmed the decision of the lower courts.

13. That on November 1, 1911, Walter L. Fisher was substituted as defendant in the place and stead of Richard A. Ballinger; on April 28, 1913, Franklin K. Lane was substituted as defendant in the place and stead of Walter L. Fisher; and October 16, 1913, Clay Tallman was substituted as defendant in the place and stead of Frederick Dennett.

14. That prior to August 3, 1899, Alexander F. Mathews and Samuel A. M. Syme, had succeeded, by mesne conveyances, to the title of the heirs of Baca, in and to said land.

15. That there appears of record in the office of [6] the County Recorder of Pima County, Arizona, at Book 31 of Deeds, of Real Estate, page 103, a deed to said land from the said Alexander F. Mathews and Samuel A. M. Syme, to the defendant Arizona Copper Estate, a copy of which deed is hereto attached as exhibit 1, and by reference made a part hereof.

16. That there also appears of record in the office of said Recorder in Book 15 of Mortgages, page 60, a reconveyance of said land by the defendant Arizona Copper Estate to the said Alexander F. Mathews and Samuel A. M. Syme, a copy of which reconveyance, is hereto attached as exhibit 2, and by reference made a part hereof.

17. That the deed, exhibit 1, and the reconveyance, exhibit 2, were made on the same day, that is August 3, 1899, and were recorded on the same date, and at the same hour, that is, at 9 o'clock A. M.,

on August 12, 1899, and were intended as a conditional sale, and were made to enable Boyce and his associates to raise in advance on the security of the loan, money with which to purchase the land for \$100,000, evidenced by the notes mentioned in the reconveyance, with the understanding that the failure to do so in time to pay the notes, according to their *tener* and effect, would leave the title in the said Mathews and Syme, just as it was immediately prior to the making of the deed exhibit 1, and avoid the transaction so far as the said Arizona Copper Estate, and Boyce and his associates were concerned.

18. That in the deed, exhibit 1, and in the reconveyance, exhibit 2, the Arizona Copper Estate is described as a corporation organized and existing under the laws of Arizona. The records in the offices of the County Recorders of Pima and Santa Cruz Counties have been examined and [7] no record of such a corporation found, and the corporation commissioner of Arizona, states that it has no record of any such corporation. Upon information and belief that no such corporation existed at the time said conveyances were made.

That the alleged corporation never did anything in connection with said land, save as appears by exhibit 1, and 2 and that it has expended no moneys towards the development of the said land; and that it has done no business since the execution of the conveyances, or at all; that it never had, and has now no assets; and that it has never entered into possession of the said land, or exercised or attempted to exercise any rights of ownership over the same.

19. That the grantors in the deed, exhibit 1, were not, nor was either of them in any way, obligated to, nor did they, or either of them, owe any money or moneys to the grantee therein, or to the stockholders or promoters thereof, or any of them, prior to, or at the time of, the execution of the deed, exhibit 1, or the reconveyance, exhibit 2, nor was there any transaction in connection with said exhibits, other than as stated in paragraph 17 hereof.

20. That the reconveyance, exhibit 2, contains the following recital:

Whereas the party of the first part has executed certain promissory notes, aggregating the sum of One Hundred ~~Thousand~~ Dollars (\$100,000.), Dollars, payable according to the terms and tenor thereof, to wit: Three notes for \$4824.20; three notes for \$5351.60; three notes for \$5824.20; and three notes for \$4000, each; each of said sets of notes falling due respectively on February 15, 1900, July 15, 1900, and January 15, 1901; also one note for \$9648.40, one for \$10,703.20, and one for \$11648.40; and one for \$8000, all of said notes being ~~due and~~ payable on the 15th day of July, 1901. All the above described notes having been executed to Alexander F. Mathews, S. A. M. Syme, U. S. Boyce, and Alexander F. Mathews, Trustee, respectively, as will appear fully on the face of said notes." [8]

and the following proviso:

“Provided always that if said notes are paid according to their tenor and effect then these

presents shall become void, and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect.”

21. That the notes mentioned in paragraph 20 hereof, were given for the purchase price of the said land by the Arizona Copper Estate; that the said notes were not paid according to their tenor, or effect, nor at all, nor has any part of any of the said notes been paid, nor any interest, nor any portion of the interest thereon, and that the plaintiffs are now the holders and owners of said notes to an amount in excess of seventy-five thousand dollars.

22. Upon information and belief that at the time of his death, U. L. Boyce, held the remainder of said notes; and that the defendants, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and the defendants who are sued as the “unknown heirs, if any, of U. L. Boyce, deceased,” are the legal representatives and heirs at law of said U. L. Boyce.

23. Upon information and belief that the said U. L. Boyce received the notes which he held, as commission, under the agreement that he would procure a purchaser, ready, willing and able to purchase the said land, and that the said U. L. Boyce gave no consideration for the notes which he held.

24. Upon information and belief that no consideration was paid by the Arizona Copper Estate for the conveyance to it by Alexander F. Mathews, and Samuel A. M. Syme, of the said land, and no act was done by it in furtherance thereof, other than the delivery of said notes.

25. That the reconveyance, exhibit 2, remains in

full force and effect as a conveyance to the said Mathews [9] and Syme, of the said land, on account of the failure of the Arizona Copper Estate, to pay the said notes, when and as they become due: the said U. L. Boyce and his associates and the Arizona Copper Estate thereby failing to carry out the agreement in furtherance of which the deed, exhibit 1, and the reconveyance, exhibit 2, were made, namely, a conditional sale, to be effective as such, if the notes were paid, and to be void in case the notes were not paid.

26. Upon information and belief, that the Arizona Copper Estate never had any funds, money, or other assets, from which to pay the said notes, and that the Arizona Copper Estate was never an actual corporation, but was merely a tentatively proposed corporation, the organization of which was never completed.

27. Upon information and belief, that the defendants U. Lawrence Boyce, W. Truxton Boyce, and Uriel Wright Boyce are not now, and never have been, citizens or residents of the State of Arizona, but are now, and have been, for several years past, residents and citizens of the State of Delaware.

28. That the names and addresses of the defendants who are described as the "unknown heirs, if any, of U. L. Boyce, deceased," are unknown to the plaintiffs. Upon information and belief the plaintiffs allege that such unknown heirs, if any, are not residents or citizens of the State of Arizona, but plaintiffs believe that if there are any such, they are citizens of the State of Virginia, residing in the County

of Clark in that state.

29. That by mesne conveyances, the plaintiffs have become and are now, the owners of the said land, and are in possession of the same; that the said deed, exhibit 1, and [10] the reconveyance exhibit 2, constitute a cloud upon the plaintiffs' title; and that the plaintiffs, as successors in title of the said Mathews and Syme, are entitled to have any rights of the Arizona Copper Estate, and the defendants, Boyce, and any person or persons claiming under it, or them, foreclosed.

30. That the plaintiffs are not now, and have never been residents or citizens of the State of Arizona, nor has either of them ever been such resident or citizen. They and each of them are now, and have been for twenty years last past, continuously, citizens of the State of West Virginia, residing respectively, the plaintiff, Cornelius C. Watts, at Charleston, West Virginia, and the plaintiff, Dabney C. T. Davis, Jr., at Lewisburg, West Virginia.

31. That the value of the land to which this suit relates is upwards of \$100,000, and the value of the plaintiffs' interest therein, is upwards of \$100,000.

WHEREFORE, the plaintiffs pray judgment:

1. That the conveyance from Mathews and Syme to the Arizona Copper Estate be declared a nullity; or if it be found that the Arizona Copper Estate was a corporation, that it be decreed that the notes described in the conveyance from the Arizona Copper Estate to the said Mathews and Syme, exhibit 2, have never, nor has any part of them been paid.

2. That it be decreed that the conveyance from

the Arizona Copper Estate to the said Mathews and Syme, exhibit 2, was a deed in fee with a condition subsequent upon the happening of which the conveyance would be void.

3. That the subsequent condition, namely, the payment of the notes, never happened, and that the conveyance remains in full force and effect, as a conveyance in fee to [11] the said Mathews and said Syme, of the land therein described; and that the defendants have not, nor have any of them, any interest in the said lands.

4. That it be decreed that a copy of this decree be filed and recorded in the office of the County Recorder of Santa Cruz County, in the State of Arizona.

5. To the end that the defendants may, if they can, show why your orators should not have the relief hereby prayed and may full, true and perfect answer make, according to the best of their knowledge, remembrance, information and belief, to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were herein repeated, paragraph for paragraph, and they were hereunto severally and specifically interrogated (but not under oath, an answer under oath being hereby expressly waived) may it please your Honor to grant unto your orators a writ of subpoena ad respondendum, issued out of and under the seal of this Honorable Court, directed to the defendant, Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and the unknown heirs, if any, of U. L. Boyce, deceased, commanding them to

be and appear and make answer unto this bill of complaint, and perform and abide by such order and decree herein, as to this Court may seem to be required by the principles of equity and good conscience.

6. That your orators may have such other, further and general relief in the premises as equity and the nature of the circumstances of the case may require.

S. L. KINGAN,

Solicitor for Plaintiffs.

HARTWELL P. HEATH,

Of Counsel. [12]

State of Arizona,

County of Pima,—ss.

Hartwell P. Heath, being duly sworn says: That he is one of the attorneys for the plaintiffs named in the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HARTWELL P. HEATH.

Subscribed and sworn to before me, this 23d day of June, 1914.

[Seal]

RENA NORTON.

Notary Public.

My commission expires February 7, 1918.

[Endorsements]: E-4. (Tucson). United States District Court, District of Arizona. Cor-

nelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, and Others, Defendants. Bill of Complaint. Filed June 23, A. D., 1914. At — A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [13]

First Amendment to Bill.

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—No. E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and the Unknown Heirs,
if any, of U. L. BOYCE, Deceased,
Defendants.

Now come the plaintiffs and amend their bill in the following manner:

Substitute the following paragraph for bankruptcy 18 of said bill:

That in the deed, exhibit 1, and in the reconveyance, exhibit 2, the Arizona Copper Estate is described as a corporation organized and existing under the laws of Arizona. The records in the offices of the County Recorders of Pima and Santa Cruz Counties have been examined and no record of such a corporation found and the corporation commis-

sion of Arizona states that it has no record of any such corporation. Upon information and belief that no such corporation existed in law or fact at the time said conveyances were made, or at any time or at all.

That the alleged corporation never did anything in connection with said land save as appears by exhibits 1 and 2; that it has expended no moneys toward the development of the said land; that it has done no business since the execution of the conveyances or at all; that it never had and now has no assets; that it has never entered into possession of the said land or exercised or attempted to exercise any rights of ownership over the same.

S. L. KINGAN,
Solicitor for Plaintiffs.

State of Arizona,
County of Pima,—ss.

S. L. Kingan being duly sworn says that he is one of the attorneys for the plaintiffs named in the foregoing [14] amendment to bill; that he has read the same and knows the contents thereof and that the same is true to the best of his information and belief.

S.L.KINGAN,

Subscribed and sworn to before me this 4th day of September, 1914.

[Seal]

R. W. LANGWORTHY,

Notary Public.

My commission expires Feb. 19, 1916.

[Endorsements]: No. E-4. In the District Court of the United States, District of Arizona. Corne-

lius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs,
vs. Arizona Copper Estate et al., Defendants.
Amendment to Plaintiffs' Bill. Filed Sep. 4, 1914,
at — A. M. George W. Lewis, Clerk. By Effie D.
Botts, Deputy Clerk. [15] t

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—No. E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and the Unknown Heirs,
if any, of U. L. BOYCE, Deceased,
Defendants.

Stipulation for First Amendment.

It is hereby stipulated that the plaintiffs may
amend their bill in the above-entitled case in ac-
cordance with the amendments hereto attached.

Dated this 4th day of September, 1914.

BEN. C. HILL,

Attorney for Arizona Copper Estate.

JOHN B. WRIGHT,

Attorney for U. Lawrence Boyce, et al.

[Endorsements]: No. E-4. In the District Court
of the United States, District of Arizona. Cor-
nelius C. Watts and Dabney C. T. Davis, Jr., vs.

Arizona Copper Estate, et al., Defendants. Amendment to Plaintiffs' Bill. Filed Sep. 4, A. D., 1914, at — A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [16]

*In the District Court of the United States in and for
the District of Arizona.*

E-4. (Tucson.)

CORNELIUS C. WATTS, et al.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, et al.,

Defendants.

Second Amendment to Bill.

The Plaintiffs make the following amendment to the bill of complaint herein:

Strike out paragraph 29 of the complaint herein and substitute therefor the following:

“29. On or about February 8, 1907, the said Samuel A. M. Syme and the heirs, devisees and legal representatives of the said Alexander F. Mathews, deceased, sold and conveyed the said land to the plaintiffs by deed duly recorded in the county of Santa Cruz, Arizona, in Book 7 of Deeds of Real Estate at page 546; or if the instrument, exhibit 2 attached hereto, be held to be a deed of trust the said Samuel A. M. Syme as surviving trustee sold and conveyed the said land to plaintiffs under the power of sale given him in exhibit 2 by the said deed of February 8, 1907. Ever since such conveyance of

February 8, 1907, plaintiffs have been and now are the owners of the said land and in the possession thereof at the commencement of this action; that the instruments, exhibit 1 and exhibit 2, attached hereto constitute a cloud on plaintiffs' title; and that plaintiffs are entitled to have any rights of the Arizona Copper Estate and the defendants Boyce and any person or persons claiming under it or them foreclosed." [17]

WHEREFORE plaintiffs pray that they may have the relief demanded in the complaint herein.

HARTWELL P. HEATH,
Solicitor for Plaintiffs.

Dated February 19, 1915.

State of New York,
County of New York,—ss.

Hartwell P. Heath, being first duly sworn says that he is one of the solicitors for the plaintiffs herein; that he has read the foregoing amendment to the complaint and knows the contents thereof; and that the same is true as he verily believes.

HARTWELL P. HEATH,

Subscribed and sworn to before me this 19th day of February, 1915.

FREDERICK W. MARQUAND,
Notary Public Kings County.

Certificate filed in N. Y. County #78.

The undersigned hereby consent to the filing of the foregoing amendment to the complaint on condition that the pleadings of the defendants heretofore made be held to apply thereto, and that they

be not required to file any additional pleadings.

BEN C. HILL,

Solicitor for Defendant Arizona Copper Estate.

JOHN B. WRIGHT,

Solicitor for Defendants Boyce.

[Endorsements]: In the District Court of the United States, District of Arizona. Cornelius C. Watts, et al., Plaintiffs, vs. Arizona Copper Estate et al., Defendants. E-4 (Tucson.) Amendment to Bill. Filed Mar. 6, A. D., 1915, at — A. M. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk.

[18]

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, et al.,

Defendants.

Third Amendment to Bill.

The plaintiffs make the following amendment to the bill of complaint herein as amended:—

Strike out the words “The holders and owners” in the sixth and seventh lines of paragraph 21 of said complaint on page 7 thereof and insert instead thereof the words “in the possession” so that the same shall read when amended as follows:

“21. That the notes mentioned in paragraph 20 hereof were given for the purchase price of the said land by the Arizona Copper Estate; that the said notes were not paid according to their tenor or effect or at all, nor has any part of said notes been paid, nor any interest nor any part of the interest thereon; and that the plaintiffs are now in the possession of said notes to an amount in excess of Seventy-five Thousand Dollars.”

WHEREFORE the plaintiffs pray that they may have the relief demanded in the complaint herein.

HARTWELL P. HEATH,
Solicitor for Plaintiffs.

Dated, March 25, 1915.

[Endorsements]: In the District Court of the United States for the District of Arizona. Cornelius C. Watts et al., Plaintiffs, vs. Arizona Copper Estate et al., Defendants, Plaintiffs' Amended Bill of Complaint. Filed March 25, 1915. George W. Lewis, Clerk. [19]

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—No. E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS,

Plaintiffs,

against

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and the Unknown Heirs,
if any, of U. L. BOYCE, Deceased,

Defendants.

Amended Answer.

NOW comes the above-named The Arizona Copper Estate, a corporation duly organized and existing under the laws of the State of Arizona, by Ben C. Hill, its solicitor, and makes the following amended answer to the Bill herein:

First. This defendant alleges that more than thirteen years have passed since the last of said notes became due and payable, and that more than fifteen years have passed since said deed to it and said mortgage by it were respectively executed, and that no action or proceeding at law or in equity or otherwise has ever been begun, taken, or instituted by the plaintiffs herein, or either of them, or by said Mathews and Syme, or either of them, or by any person claiming by, from, through, or under them, or either of them, or by any owner or holder of any note secured by said mortgage, against this defendant for

any of the relief prayed for in the Bill, or for the payment of said notes or any of them or for the foreclosure of said mortgage, or for the sale of said property in accordance with the terms of said mortgage, and that any and all rights and remedies of the plaintiffs herein are now barred by their gross laches, and by every [20] statute or rule of limitation of the United States of America, and of the State of Arizona, and of the former Territory of Arizona.

Second: Answering the paragraph or section of said Bill marked "7," it denies upon information and belief that the delay in making the survey was due to any controversy with the United States as to the land described in the section or paragraph of the Bill marked "2," or because of any dispute as to who should pay for said survey; and this defendant alleges, upon information and belief, that between April, 1866 and June, 1899, the predecessors in interest of the plaintiffs herein were endeavoring to secure from the Land Department of the United States an approval of the location of another tract of land in lieu of the land described in the paragraph or section of the Bill marked "2."

Third. Answering the paragraph or section of the Bill marked "8," it denies upon information and belief each and every allegation therein contained, except that it admits that after the making of the survey in 1905, the Land Department of the United States illegally and without authority, claimed jurisdiction to determine whether the land, selected or located as set forth in the paragraph or section of

the Bill marked "2," was a proper selection because of the report made by the Surveyor General of Arizona in November, 1906.

Fourth. Answering the paragraph or section of the Bill marked "9," it denies upon information and belief each and every allegation therein contained.

Fifth. Answering the paragraph or section of the Bill marked "10," it denies upon information and belief that the plaintiffs in said action were the owners of said land described in paragraph or section of the Bill marked "2," and [21] further alleges that it was not a party to said action in any way.

Sixth. Answering the paragraph or section of the Bill marked "14," it admits that said Alexander F. Mathews and Samuel A. M. Syme had prior to August 3, 1899, succeeded by mesne conveyances to interest conveyed to Christopher E. Hawley by John S. Watts, under a certain deed dated January 8, 1870, recorded in the office of the recorder of Pima County, Arizona, on May 9, 1885, in Liber 13 of Deeds of Real Estate, page 66, conveying by metes and bounds a tract of land, a small part of which was included within the location of Baca Float No. 3 as located on June 17, 1863, and this defendant avers that it is advised by its solicitor and verily believes that the construction of said deed and as to whether or not said deed covered the interest of the grantor in the rest of Baca Float No. 3, as located on June 17, 1863, is a question of law to be determined by this Court. In all other respects this defendant, on information and belief, denies each and every allegation in said paragraph contained.

Seventh. Answering the paragraph of section of the Bill marked "15," it avers that said deed has also been duly recorded in the office of the recorder of Santa Cruz County, Arizona.

Eighth. Answering the paragraph or section of the Bill marked "16," it avers that said instrument is and was intended to be a purchase money mortgage from this defendant to said Alexander F. Mathews and Samuel A. M. Syme, as Trustees for the holders of the notes specified in said mortgage; and on information and belief, it denies that said exhibit 2 is a true copy of said instrument.

Ninth. Answering the paragraph or section of the Bill [22] marked "17," on information and belief this defendant denies each and every allegation therein contained, except that it admits that said deed and said reconveyance by way of mortgage were made and recorded on the same date. It avers upon information and belief that if any such agreement was made, it was not evidenced in writing, signed by this defendant, as required by law.

Tenth. Answering the paragraph or section of the Bill marked "18," this defendant alleges that it is a corporation duly organized and existing under the laws of the Territory (now State) of Arizona and that it was such a corporation and was so duly organized and existing on said August 3, 1899, and for some time prior thereto. This defendant avers that at the time of the commencement of this action, it had assets, and that prior thereto it had made efforts to dispose of said land, and had done business in connection therewith.

Eleventh. Answering the paragraph or section of the Bill marked "19," it reiterates the averments and denials hereinbefore contained and set forth in this answer.

Twelfth. Answering the paragraph or section of the Bill marked "21," it avers that it is without knowledge, information or belief as to how many of said notes are held or owned by the plaintiffs herein or either of them; and it denies upon information and belief that said notes constituted the entire purchase price.

Thirteenth. Answering the paragraph or section of the Bill marked "22," it avers that it is without knowledge, information or belief as to all or any of the matters therein contained.

Fourteenth. Answering the paragraph or section of the Bill marked "23," it avers that it is without knowledge, information [23] or belief as to all or any of the matters therein contained.

Fifteenth. Answering the paragraph or section of the Bill marked "24," on information and belief, this defendant denies each and every allegation therein contained.

Sixteenth. Answering the paragraph or section of the Bill marked "25," on information and belief, this defendant denies each and every allegation therein contained.

Seventeenth. Answering the paragraph or section of the Bill marked "26," on information and belief, this defendant denies each and every allegation therein contained.

Eighteenth. Answering the paragraph or section

of the Bill marked "27," this defendant avers that it is without knowledge, information or belief, as to all or any of the matters therein alleged.

Nineteenth. Answering the paragraph or section of the Bill marked "28," this defendant avers that it is without knowledge, information or belief as to all or any of the matters therein contained.

Twentieth. Answering the paragraph or section of the Bill marked "29," upon information and belief, it denies each and every allegation therein contained.

Twenty-first. Answering the paragraph or section of the Bill marked "31," on information and belief this defendant denies that the value of the plaintiffs' interest in said land is upwards of one hundred thousand (\$100,000) dollars, or that it amounts to any sum whatsoever.

Twenty-second. Further answering the Bill herein, this defendant alleges, upon information and belief, that since the filing of the Bill herein, it has duly and for value quitclaimed and conveyed to A. M. Fowler the lands described or [24] referred to in said Bill.

WHEREFORE, this defendant demands judgment dismissing the Bill with costs, and granting to this defendant such other and further relief as to the Court may seem just.

THE ARIZONA COPPER ESTATE.

By BEN C. HILL,

Its Solicitor.

[Endorsements]: United States District Court,
District of Arizona. In Equity No. E-4, Tucson.

Cornelius C. Watts et al., Plaintiffs, Against Arizona Copper Estate et al., Defendants. (Original). Amended Answer of the Arizona Copper Estate. Ben C. Hill, Solicitor for The Arizona Copper Estate. Filed Sept. 2, A. D., 1914, at — A. M. George W. Lewis, Clerk. By S. D. Gromer, Deputy Clerk. [25]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY E-4. (Tucson).

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, et al,
Defendants.

Stipulation as to the Amended Answer.

It is stipulated that the amended answer of the defendant, Arizona Copper Estate, filed herein on September 2d, 1914, stand and be taken as its answer to the Bill herein as amended, with the same force and effect as if said instrument had been filed and served as the answer to the Bill herein as amended.

S. L. KINGAN,

Solicitor for Plaintiff.

JOHN B. WRIGHT,

Solicitor for U. S. Boyce et al.

BEN C. HILL,

Solicitor for Arizona Copper Estate.

[Endorsements]: In the District Court of the United States, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate et al., Defendants. In Equity E-4. (Tucson). Stipulation. Filed Sept. 22, A. D. 1914, at — A. M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [26]

Stipulation Waiving Certain Proof.

*District Court of the United States District of
Arizona.*

E-4. (Tucson).

CORNELIUS C. WATTS, et al.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, et al.,

Defendants.

It is hereby conceded for the purpose of the above case that the following statement of facts is true and that any party to the above case may introduce the same as proof of the same.

Alexander F. Mathews was born on or about December —, 1838, at Lewisburg, W. Va., and was married in 1866 at Christinasburg, W. Va., to Laura Gardner; and died at a hospital in Philadelphia, Pa., on or about December 10, 1907. He was throughout his life a resident of Lewisburg, W. Va. He was survived by his widow Laura G. Mathews and the following adult children, Mason Mathews, Charles G. Mathews, Elizabeth P. Mathews, and Henry

Mason Mathews. He left no adopted child or children, or the issue of any adopted child or children, or the issue of any deceased child. He was married only once, and his marriage was dissolved only by his death.

Samuel A. M. Syme was married on or about December 13, 1866, to Mary Maxwell at Tappahannock, Va., and his said wife died at Washington, D. C., on or about March 10, 1910. At the time of his marriage said Syme was and ever since he *has a* resident of the State of West Virginia or the District of Columbia. The only children of the marriage are Conrad [27] H. Syme, William Henry Syme, James C. Syme, Mary Maxwell Syme, and Eliza S. Whitehead. Mr. Syme was married only once and his marriage was dissolved only by the death of his wife as aforesaid.

Dated December 21, 1914.

HARTWELL P. HEATH,

Sol'r for Plffs.

JOHN B. WRIGHT,

Solicitor for Defendants Boyce et al.

BEN C. HILL,

Solicitor for Arizona Copper Estate.

[Endorsements]: District Court of the United States, District of Arizona. Cornelius C. Watts et al., Plaintiffs, vs. Arizona Copper Estate, et al., E-4 Tucson. Stipulation in regard to Mathews and Syme. Filed Feb. 20, A. D., 1915. George W. Lewis Clerk. By S. D. Gromer, Deputy Clerk.

*In the District Court of the United States Southern
District of Arizona.*

No. E-4.

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. THURSTON BOYCE, URIEL
BOYCE, and the Unknown Heirs, if any, of
U. LAWRENCE BOYCE, Deceased,

Defendants.

Abstract of Testimony and Certain Exhibits.

Trial had on March 25, 26, 1915, before Hon. WILLIAM H. SAWTELLE, Judge of the United States District Court of Arizona, at the courtroom of said Court, Tucson, Arizona, without a jury.

APPEARANCES: Herbert Noble, S. L. Kingan and H. P. Heath, Esqrs., for plaintiffs.

G. H. Brevillier and Ben C. Hill, Esqrs., for Arizona Copper Estate.

The other defendants answered but defaulted at the trial, and a decree *pro confesso* was entered as to them.

[Testimony of Samuel A. M. Syme, for Plaintiffs.]

SAMUEL A. M. SYME, called as a witness on behalf of the plaintiffs, was examined under oath and testified as follows:

I reside at Washington, D. C., and will be seventy-

(Testimony of Samuel A. M. Syme.)

seven the eighth of April. I was in the Confederate Army. I knew Alexander F. Mathews since his childhood. I recall perfectly the transaction in New York occurring on or about August 3, 1899, between myself, Capt. Mathews and ex-Senator Dorsey; Philip K. Reynolds, Col. Boyce, a stenographer [29] and James Simmons being also present. The transaction related to Baca Float No. 3 and nothing else. Previously thereto Senator Dorsey and I had had transactions for several months, I should say sixty or ninety days probably, in respect to that matter, and before my arrival at New York I had arrived at an agreement with him. At the time of the meeting in New York the various parties above named were present and we were in consultation with each other and we all agreed upon that agreement whose terms were restated so that we all heard what was said.

Q. Now, will you tell the Court, Colonel, what your agreement was with Senator Dorsey?

Mr. BREVILLIER.—If the Court please, I object to the evidence as incompetent, immaterial and irrelevant, and inadmissible to vary, modify or contradict a written instrument. The plaintiffs in their opening have specifically stated that this is an action to quiet title, and as I recall Mr. Heath, to quiet title and nothing else. It is not an action to reform an instrument or to correct in any way; the papers that were admitted and signed in the transaction are a part of the bill, and parol evidence at this late day to alter, vary, modify or contradict those papers in

(Testimony of Samuel A. M. Syme.)

any manner is inadmissible not only under any theory of law but under the pleadings in this action.

The COURT.—I will overrule the objection.

Mr. BREVILLIER.—I will take an exception.

To which ruling of the Court, the defendant by its counsel then and there duly excepted.

My agreement with Senator Dorsey was this: We first talked about an option and we couldn't agree on that because he wanted a deed, because he said that he thought he could use that better. I had made the proposition that I would sell him that property for \$5,000 cash to me personally for [30] procuring the deed, and he wanted to give me a deed in exchange at the same time.

Mr. NOBLE.—Now, just tell us what the substance was, of what was said by you to Senator Dorsey, by Senator Dorsey to you and by each of you to each other, which constituted what you have called the agreement, the conversations which went into what you called the agreement.

Mr. BREVILLIER.—I renew my objection, and I suppose there will be the same ruling.

The COURT.—Yes, the same ruling.

Mr. BREVILLIER.—And I take an exception.

To which ruling of the Court, the defendant by its counsel then and there duly excepted.

A. Senator Dorsey wanted the property: I told him that I would sell him that property for \$100,000. He was to pay me \$5,000 personally in cash, and \$100,000 for the property: And then he replied that he would consent to the agreement if I would give

(Testimony of Samuel A. M. Syme.)

him a deed. I objected to the deed to some extent, and then he explained to me that the deed would be in effect of such a character that the property would be held by us and the title in us, and not go out of us, and if the notes weren't paid the whole property would be in us still, and everything would be void, notes and all.

So far as I can recollect that is what Senator Dorsey and I said to each other. He was to pay me \$5,000 in money to procure the deed from Capt. Alexander F. Mathews and myself. Capt. Mathews was a lifetime friend of mine, and a well-known lawyer and the president of a bank in Lewisburg, of which he was the originator and the largest stockholder. Senator Dorsey was to pay \$100,000 in notes for the property.

Q. Now what was said in the agreement between you and Dorsey as to what was to happen in case these notes weren't paid on their due dates?

Mr. BREVILLIER.—If the Court please, I object upon the [31] ground that all the negotiations between the parties are merged, confessedly merged in the instrument in writing about which there is no apparent ambiguity, and that the testimony of the witness is inadmissible to impart any legal effect to it other than that imparted by the words of the instrument.

The COURT.—The objection is overruled.

Mr. BREVILLIER.— I except.

To which ruling of the Court, the defendant by its counsel then and there duly excepted.

(Testimony of Samuel A. M. Syme.)

A. If the notes weren't paid—all the notes weren't paid, the property was to remain in us and the notes were to become void and the whole thing wiped out.

As I said before, Dorsey wanted that property and he was very frank and told me he wanted it more than I wanted to sell it. He wanted it and I knew he wanted it. I wanted to sell it, but before we could not agree upon any terms. And this proposition was made by me or by him, I think by me, that I would do this; procure deeds to the property, don't you see, if he would pay me \$5,000 for procuring that deed, and then give me a deed, or something of the same character, that would leave the title in us unless every note was paid.

The \$5,000 was not to be a part of the purchase price but was to come to me personally. He was to pay me \$5,000 for giving him an option for a certain period.

The meeting on August 3, 1899, was at Senator Dorsey's office, 11 Broadway, New York City, in the suite of the American Exploration Company. Capt. Mathews and I went over from Washington for the meeting. En route I told Capt. Mathews of my agreement with Senator Dorsey. I had known Col. Boyce for a number of years. He had nothing to do with the agreement with Senator Dorsey, but had something before to do with trying to make an agreement. The terms of my agreement with Senator Dorsey were restated at Senator [32] Dorsey's office on August 3, 1899, in the presence of Capt. Mathews, Senator Dorsey, Philip K. Reynolds,

(Testimony of Samuel A. M. Syme.)

James Simmons and a stenographer, and we agreed upon my agreement with Senator Dorsey. In substance it was said among all of us, you know, that if all of the notes weren't paid everything became void, the notes and all, and the thing passed off and we stood the original grantors, Mathews and myself, holding the title. My dealings were entirely with Senator Dorsey and I made my agreement with Senator Dorsey. And Dorsey conducted the entire transaction *vis-a-vis*. me and Captain Mathews. There was nobody else. The papers that were executed on that day were prepared by Capt. Mathews. I think the paper now handed me (Plaintiffs' Exhibit "B") is a copy of the paper that was executed on that date. The paper now handed me (Plaintiffs' Exhibit "C") is the original of the paper that was executed that day by the Arizona Copper Estate to Capt. Mathews and myself. Both these papers were executed and delivered simultaneously.

A discussion then arose during the trial as to whether or not the defendant, Arizona Copper Estate, was properly in Court.

The COURT.—I do not know but what their motion to require you to show that you are here representing this corporation should have been considered by the Court, the question of whether or not this is *res adjudicata* in the event of a judgment. I always assume that counsel practicing in this court are properly here and representing the plaintiff or the defendant, as the case may be, for whom they appear. Now, when they are representing a corporation, and

(Testimony of Samuel A. M. Syme.)

when, as in this case, it is shown that that corporation has been inactive, has not been doing business for the last ten or fifteen years, and the question is raised at any time during the progress of the trial as to whether or not they are properly in court, then I think it is the duty of [33] the Court to satisfy itself on that point—not a matter that reflects upon counsel in the case, but in order to determine whether the Court has jurisdiction of the corporation. There is a peculiar situation here in Arizona. Until recently the corporation commission of Arizona was not in existence. Of course, not until after statehood. This corporation was formed a good many years ago, and the corporation commission have no record, it appears, of this corporation, and therefore, there might be some question as to whether or not the service upon that commission could be held service upon the corporation, and I can readily understand why counsel should feel, in view of all the conditions, that it should be shown that you gentlemen have been employed by that corporation to appear in this case.

Mr. HILL.—I have a telegram here which is signed by the Arizona Copper Estate, and this is one of a number of telegrams that have passed between myself and Mr. Dorsey and Mr. Brevillier.

(Reading:)

“Los Angeles, California, July 28, 1914.

Ben C. Hill, Tucson, Arizona.

You are authorized to appear for the Arizona Copper Estate in suit in United States Court against said

(Testimony of Samuel A. M. Syme.)

corporation so far as I have power to give such authority. The Arizona Copper Estate by Stephen W. Dorsey, President."

Now, I can bring up my whole correspondence file if counsel care to see it.

The COURT.—I will hold that sufficient. You may file that telegram if you do not object to it.

Mr. HILL.—I will state that this is in response to a telegram that I had sent to Mr. Dorsey at Los Angeles after my first telegram from him.

The examination in chief of Col. Syme was then resumed.

Dorsey gave directions to Mathews how to draw the [34] papers. We agreed that Mathews should draw the papers and Dorsey told Capt. Mathews to put in the name Arizona Copper Estate as grantee in one paper and grantor in the other. Prior thereto I had never had any dealings with nor heard of the Arizona Copper Estate. My dealings had been entirely with Dorsey. Notes aggregating \$100,000 were written out and signed by the Arizona Copper Estate by James Simmons, Vice-president.

(Papers shown witness.) These were the notes.

It was conceded by the defendant that no payment has been made on the notes.

Mr. NOBLE.—If the Court please, according to our pleadings these—we put these notes in the custody of the Court to follow whatever course the Court may determine in connection with this admission that they have not been paid.

(Testimony of Samuel A. M. Syme.)

The COURT.—Any objection?

Mr. BREVILLIER.—No, as I understand they are all offered in evidence.

The COURT.—They may be admitted with the privilege of withdrawing and substituting copies at such time as the Court may direct.

(The papers were marked by the Clerk Plaintiffs' Ex. "D-1," "D-2," "D-3," "D-4," "D-5," "D-6," "D-7," "D-8," "D-9," "D-10," "D-11," and "D-12," respectively.)

Mr. HEATH.—We claim under the pleadings and under the facts that these notes are void for non-payment. Therefore, we surrender them, in case your Honor agrees with us, for such disposition, to be returned to Mr. Dorsey or anybody else that your Honor may see fit to direct.

Col. SYME.—I sent the Plaintiffs' Exhibit "C" to be recorded. I never saw Senator Dorsey after August 3, 1899. Some of the notes that were executed on that date were delivered to me, some to Capt. Mathews and some to Col. Boyce. Those delivered to Col. Boyce were given simply as a commission for making a sale of this property. If [35] there was a sale he got that much commission out of the sale of the moneys we received. That is all the interest he had in it, it was only a commission; if the notes weren't paid Boyce was not to get anything. I never saw Col. Boyce afterwards. I never heard from the Copper Estate or its officers afterwards. Later, understanding that the whole thing had been abandoned, I saw William H. Reyn-

(Testimony of Samuel A. M. Syme.)

olds and made a proposition to him that he put up the money necessary to carry this thing through, get the title to it and sell it, and later he told me he would let me hear from him in a few days.

Mr. BREVILLIER.—I move to strike out the witness' statement that he understanding and I understanding that the whole thing had been abandoned. There is no connection of Mr. Reynolds shown with the transaction, and I object to it as a conclusion of the witness.

The COURT.—I sustain your motion to strike out that portion of this witness' last answer which states that he understanding, meaning Mr. Reynolds, that the whole thing had been abandoned.

Mr. BREVILLIER.—I take an exception to the denial of the motion in part.

To which ruling of the Court, the defendant, by its counsel, then and there duly excepted.

In my talk with William H. Reynolds he said he was sorry to lose the \$5,000 paid August 3, 1899. Williams H. Reynolds was either the father or grandfather of Philip K. Reynolds, who signed these papers as secretary.

The witness then testified under objection and exception as follows:

I think it was the fall of 1900, or thereabouts, as near as I can tell, I went to see William H. Reynolds in regard to the handling of this matter of Baca Float No. 3. [36] I had taken up the thing to handle it, try and do something with it, and I went to see William H. Reynolds and I interested Will-

(Testimony of Samuel A. M. Syme.)

iam H. Reynolds very much in it. I said to him that if he would come into the proposition and put up so much money, I would take him in, and he complained of losing \$5,000 or \$10,000. I said five, but that is impressed upon my memory, because he said once before only five and then afterwards ten, five or ten thousand dollars. He had already lost it and would like to have it back. "Well," I says, "Come in and put up some money and we will handle this and by that means you will get your money back." He told me he would go out for a while and see his lawyer, and that he would think about the matter and he would come back and see me that evening. He came back that afternoon, and I went back and saw Colonel Reynolds, and when he saw me he spoke to me and said, "Colonel, I am in a much better humor than I was when you were here to-day." I told him I was very glad to hear it, and he says, "I have been looking into this matter and looking into my bank account, and I have not made up my mind that I can draw on my bank account just at this time, but I will look farther into it, and if I find out I will then let you know what I will do in this case." Colonel Reynolds did not say anything at that time about the Arizona Copper Estate being the owner of the Baca Float No. 3 or having any [37] interest in it.

On Cross-examination by Mr. BREVILLIER.

Capt. Mathews was a lawyer, in active practice in 1899 and considered to be a very good lawyer. In connection with his professional practice he specu-

(Testimony of Samuel A. M. Syme.)

lated somewhat in real estate in a very conservative way, and bought and sold coal and other lands in West Virginia. In my opinion he had considerable familiarity with real estate and real estate transactions. I commenced negotiating with Senator Dorsey about three or four months before August, 1899, and signed a paper in the nature of an agreement to convey Baca Float No. 3 for substantially \$125,000. I do not say that I signed any contract or agreement that amounted to a contract or agreement, but I signed a paper. In that paper Mr. Boyce and I agreed to sell the Float for \$125,000. I called that agreement off after I made certain discoveries. Boyce told me that Dorsey had told him that \$25,000 would be paid as soon as I could get a communication from the Bouldins that they would sell their portion of the property to me for a certain amount. Dorsey denied making such a statement and afterwards Boyce acknowledged that Dorsey was correct. I also found that Boyce was reserving 10% of the property and, therefore, I repudiated the contract which Boyce and I had signed to sell the property to Dorsey. Before I went to New York I knew of the secretary's decision of July 25, 1899 (29L. D. 44) changing the location on the Float. The \$5,000 which passed in New York was in Dorsey's checks, one for \$2,000 to me, another for \$1,000 less the war stamps to Capt. Mathews, and other to Boyce for \$2,000. The notes were then and there divided between Mathews, Boyce and myself, Boyce receiving about \$25,000 in notes. I kept my notes.

(Testimony of Samuel A. M. Syme.)

Four of the notes produced by the plaintiffs were shown to the witness and he identified the endorsement of [38] Alexander F. Mathews which had been scratched out. The witness also identified his endorsement on the back of the notes made payable to him.

Col. SYME.—I did not discount them. The notes were sent on for collection and never paid. Capt. Mathews dictated the paper (Plaintiffs' Exhibit "C") which was given by the Copper Estate to Capt. Mathews and myself. It was filled out on a law blank. After it was recorded it was alternately in the possession of Captain Mathews and myself. Prior to 1899 I had been a clerk in the treasury department for about twenty-five years. Shortly after we went into Baca Float, I sent all those papers out to Mathews. You are talking about after this failed? Oh, after this failed that paper, I think, was almost entirely in my hands until I turned it over to the gentlemen that I sold the property to. I turned the paper over to Watts and Davis in 1906 together with all the other deeds and papers that I had, including the notes, and after the deed to Watts and Davis was signed.

Q. Well, you testified in Washington that the deed was made in 1907 and in 1906 you turned these papers over to them.

A. Oh, well, you have got me confused as to dates there, if I did. I can't tell you; I tell you now that I can't recollect exactly the dates

Q. Watts and Davis acted for you and Capt.

(Testimony of Samuel A. M. Syme.)

Mathews as attorneys in the year 1906.

Mr. NOBLE.—We are perfectly willing to state, if Mr. Brevillier will take our statement.

Mr. BREVILLIER.—Certainly.

Mr. NOBLE.—That the papers have been in the possession of Watts and Davis and ourselves as their counsel since on or about 1906 and 1907.

Between the 1899 transaction and the transaction with Watts and Davis I went first to William H. Reynolds and after I got through with Reynolds I had negotiations with my [39] son and Charles Douglas and some other gentlemen and turned the thing over to them. They were attorneys. I joined in with them to manipulate it and get the profits on it. I took down to their office a large lot of papers which they retained for some time, and when they concluded to drop the business I went down and got them again. I think Plaintiffs' Exhibit "C" was among those papers, but I do not know. Capt. Mathews read over Plaintiffs' Exhibit "C" after it was executed.

On Redirect Examination by Mr. NOBLE.

Capt. Mathews, as trustee, received \$20,000 of the notes. Capt. Mathews personally \$26,758, Col. Boyce, \$24,121, and I received \$29,121 of the notes. Of the \$5,000 of my individual money I gave \$1,000 of it to Capt. Mathews because he had been to a great deal of expense in this business and had done a lot of work. That \$1,000 was deducted from his original share of the notes. The same was done with reference to the \$2,000 to Boyce. Under the cir-

cumstances I thought that when we were getting \$100,000 for our interest in the Float we were getting a good price for it. I directed Senator Dorsey to give Mathews and Boyce checks for \$1,000 and \$2,000, respectively.

On Recross-examination by Mr. BREVILLIER.

It is stated in Plaintiffs' Exhibit "C" itself—I afterwards read it—but it was understood and stated there that the property would come back to us if the notes weren't paid in full, and Capt. Mathews stated that if the notes weren't paid that the property belonged to Mathews and myself.

On Redirect Examination by Mr. NOBLE.

Q. Mr. Brevillier asked you what was said at the meeting on August 3d as to what would happen if the notes weren't paid. Now, I would like you to say again just all that was said about that.

Mr. BREVILLIER.—I object. [40]

The COURT.—Objection overruled. Let him answer.

Mr. BREVILLIER.—Exception.

It was stated by Capt. Mathews or by me or by Senator Dorsey at the meeting of Aug. 3d, 1899, that if these notes weren't paid the whole thing amounted to nothing and it stood just as it did before, that the whole transaction would be null and void, including the notes and that the title would be in Mathews and myself if all the notes weren't paid and we would get the property.

On Recross-examination by Mr. BREVILLIER.

I have talked freely and frequently about that transaction with Mr. Noble and with Mr. Heath

(Testimony of Samuel A. M. Syme.)

and other counsel for the plaintiffs and they told me their opinions about it, some of them. They varied in my opinion about it. I had my opinion and I believe that was the best opinion in the whole lot.

I still have an interest in the property and Watts and Davis represent me and the Mathews Estate, and have ever since 1907.

By Mr. NOBLE.—I will state that the witness, if this property is ever sold or realized on, will get as a part of the purchase price for which he sold it to Watts and Davis, a substantial interest.

On Redirect Examination by Mr. NOBLE.

Q. I asked you yesterday, Colonel, about a conversation which you and Captain Mathews had, just after you left the office at 11 Broadway. Who were present at the conversation to which you referred? A. When we left the office of Dorsey?

Q. Yes, sir.

A. Mathews and myself went down on the elevator together, and we got outside the door—

Mr. BREVILLIER.—One moment.

Mr. NOBLE.—Q. Now, was Ex-Senator Dorsey present with you and Capt. Mathews at the time this conversation took place about which you referred yesterday? A. Yes, sir. [41]

Q. Now, then, you may state, if you please, what the conversation was.

A. The only conversation was that I asked—

Q. Excuse me, you had a conversation with Capt. Mathews in Mr. Dorsey's presence? A. Yes, sir.

(Testimony of Samuel A. M. Syme.)

Q. You may state what it was.

A. It hardly could be called a conversation. I just simply asked Captain Mathews what would be the nature of the case if these notes were never paid. He says the property will stand just as it did before, that is, the title in Mathews and myself.

Mr. BREVILLIER.—I move to strike out the testimony as incompetent, immaterial and irrelevant and as tending to vary, modify or contradict a written instrument and the legal import of that instrument.

The COURT.—The motion is denied.

Mr. BREVILLIER.—And I except.

To which ruling of the Court, the defendant by its counsel then and there duly excepted.

Mr. NOBLE.—Q. Did Senator Dorsey make any comment upon what Captain Mathews said?

A. None at all.

Neither Capt. Mathews or myself borrowed any money from the Copper Estate, nor from Senator Dorsey, Simmons nor Philip K. Reynolds.

The witness stated under objection of the defendant and exception, that neither he nor Capt. Mathews borrowed or loaned or owed any money to any of the persons or the corporation above named, and that neither Senator Dorsey nor the Copper Estate nor any of the persons named on that day owed any money to Mathews or Syme.

Q. You neither borrowed or loaned?

A. Oh, no, there was no money transaction of that kind.

(Testimony of Samuel A. M. Syme.)

(It is stipulated that no question of community property is involved.)

Col. SYME.—At the time of the meeting in August, 1899, Dorsey refused to give Boyce 10% of the stock of the Copper Estate, saying, “I will not break into that stock.” I had no [42] interest in that stock.

Recross-examination by Mr. BREVILLIER.

Col. SYME.—In my deposition taken herein at Washington I stated that no legal steps were ever taken to enforce payment of any of the notes or to sell the property and that we ignored the paper entirely, and that no steps were taken to sell the property in accordance with the law by foreclosure at public sale. My theory of the August, 1899, transaction is that if the notes weren't paid the control of the property would come back to us. That is what I meant for the property was already in our possession by the deed of reconveyance. (Plaintiff's Exhibit “C.”) I considered the paper a straight deed of reconveyance and not a mortgage. Probably if I were a lawyer I would know the difference between a deed and a mortgage but I do not, and I don't expect some lawyers exactly know. I sent the paper by express to be recorded. Capt. Mathews turned it over to me. I thought the control of the property would come back to us when the Copper Estate failed to pay the last note, and that up to that time they had the control of it and could have sold it. I never stopped to consider what would happen if the first notes were paid and

(Testimony of Samuel A. M. Syme.)

the others were not. I considered the paper in the nature of an option and that we conveyed the property to the Copper Estate and that it reconveyed it to us to secure the property to us if the notes weren't paid, so that we could get control of the property as we already had the property under the instrument of reconveyance. I understand that the paper (Plaintiffs' Exhibit "C") expresses the transaction as I understood it, because so far as I understand it, it states expressly that if the notes are not paid the title was back in Mathews and myself. I am no lawyer and probably might be fooled by a paper. Between 1899 and 1906 we had nothing to do with the property with the Land Department. I already had the property. How [43] should I think it would come back? The title was in us but the control for the time being limited by the notes to me and Mathews was out of us. In my deposition taken herein by the plaintiffs I testified that at the time I thought nothing about the particular date when the property would revert to us whether upon the failure to pay the last note or the first. I knew that the property was to come back to us and I knew it was coming in the course of time. When I use the words "come back" I mean control. There is a difference between coming back and control. Do you understand me? They had the control during the limit of the notes. The period of the notes was limited. They had control of the property, but the reconveyance was back to Mathews and myself of the property itself to be held by Dor-

(Testimony of Samuel A. M. Syme.)

sey during the period of the notes, you know, limited. I presume the last note—would presume the last note, if that was not paid, then the control came back and Dorsey had nothing more to do with the property, and everything was void, notes and all. Now, that was my understanding.

It was then stipulated by counsel that Baca Float No. 3 was segregated from the public domain by the filing of the plat of survey in December, 1914, and that the property now and at the time of the commencement of this action exceeded in value the jurisdictional amount.

The plaintiffs then read the deposition of Philip K. Reynolds taken by them on due notice which was in substance as follows:

[Deposition of Phillip Keep Reynolds.]

My name is Phillip Keep Reynolds, age thirty-six, residence, Brookline, Mass., occupation, assistant to president of the United Fruit Company. I have been with the Fruit Company in Boston since October 1, 1899. Prior to that time I was the secretary of my grandfather, Col. William H. Reynolds, of New York City, for fifteen months. My grandfather died Nov. 9, 1906. In August, 1899, he was [44] connected with the American Exploration Company. Its original office was No. 11 Broadway, and when my grandfather moved his office across the street to 32 Broadway that became its office also. My recollection is that he was the head and the leading spirit of that company. James Simmons was associated with him and the Exploration

(Testimony of Dabney C. D. Davis, Jr.)

Company. Mr. Simmons died sometime ago. I knew Stephen W. Dorsey at that time. He knew my grandfather and they had business relations together and Dorsey visited the offices of the company. (Paper Plaintiff's Exhibit "C" shown witness.) The signatures of Philip K. Reynolds and of James Simmons to that paper are genuine, and the handwriting in the body of the paper is that of a young lady clerk, Miss May Crandall. The Arizona Copper Estate was organized by my grandfather, Col. Reynolds, to take over and develop the property known as Baca Float No. 3. As I recall, Mr. Dorsey assisted my grandfather in looking into this property. The proposition was brought into the office by Mr. Boyce. I think that Col. Reynolds was the president of the Copper Estate. I do not recall that Mr. Dorsey held any official position. Only a few meetings of the Copper Estate were held and those were of a routine character. It kept a minute book of the meetings that were held, and there was a stock certificate book. Only a few stock certificates were issued. To the best of my recollection, the only issue of shares was for the purpose of qualifying directors. The Copper estate had a seal, and during my connection with it I kept the records and the seal. When I left New York to come to Boston in 1899, I resigned and the minute book, the stock certificate book, and the seal were left in the office safe. I do not know what became of them afterwards, nor do I know where they are now. I think I recollect a meeting at 11 Broadway, New York, on August 3, 1899, at

(Testimony of Dabney C. D. Davis, Jr.)

which the paper (Plaintiff's Exhibit "C") was signed, and at which Senator Dorsey, James Simmons, [45] myself, a clerk and two other gentlemen were present, but I do not remember what occurred at that meeting in regard to the execution of the paper or recall any conversation that occurred there. I would not deny that at that meeting there was conversation as to the title of Baca Float No. 3 remaining in the two gentlemen I did not name in case the payments were not made. (Photograph admitted to be that of Colonel S. A. M. Syme shown witness.) That gentleman called once at my grandfather's office after he had moved across Broadway as one of the persons then interested in Baca Float No. 3. I became Secretary of the Copper estate upon its organization about six months before I left New York in the fall of 1899. I had no personal interest in the Copper estate.

It is conceded herein that at the time of the commencement of this action the plaintiffs had possession of the property known as Baca Float No. 3 involved in this action, having taken actual possession shortly before the commencement of this suit.

**[Testimony of Dabney C. D. Davis, Jr., for
Plaintiffs.]**

DABNEY C. T. DAVIS, Jr., called as witness on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. NOBLE.

Q. Mr. Davis, you are one of the plaintiffs in this action, are you not? A. Yes, I am.

(Testimoney of Dabney C. D. Davis, Jr.)

Q. On or about the 20th day of June, 1914, did you have an interview or talk with Senator Dorsey in Los Angeles, California? A. I did.

Q. I show you a paper and ask you if that paper was signed by Senator Dorsey in your presence .

A. It was.

Q. Had Senator Dorsey read it over before signing it? A. He had.

Mr. NOBLE.—That is all. [46]

I now offer the paper in evidence. (Plaintiffs' Exhibit "F.")

Mr. BREVILLIER.—I object to this as an *ex parte* affidavit that was procured before the commencement of this action, without any cross-examination or without the parties being represented by counsel in any way.

Mr. NOBLE.—We do not offer it as a deposition, if the Court please. We merely offer it as a statement signed by Mr. Dorsey without any reference to the fact that it is sworn to.

Mr. BREVILLIER.—If the Court, please, this purports to be an individual statement by Stephen W. Dorsey, and it does not purport to be a proper statement in any way. He discusses the legal effect of various papers in a conflicting way. Will your Honor read it?

The COURT.—No, not at this particular time.

Mr. BREVILLIER.—It was a statement that was taken *ex parte* before the commencement of this action, and it purports to be an individual statement of Mr. Dorsey.

(Testimoney of Dabney C. D. Davis, Jr.)

The COURT.—According to the evidence before the Court, it appears that Mr. Dorsey either owned or was in control of the corporation. It was his corporation, and the dealings that Mr. Syme and Mr. Mathews had with him were personal up to the time the conveyance was made. If you gentlemen are not employed by Mr. Dorsey, if the corporation has taken no action to employ you in this case, whom do you represent?

Mr. BREVILLIER.—The question is this, your Honor—

Mr. KINGAN.—Please answer the Court's question.

The COURT.—In all deference to the Court now, whom do you represent?

Mr. BREVILLIER.—We are here for the Copper Estate.

The COURT.—How did you get here?

Mr. BREVILLIER.—Under that authorization which Mr. Hill showed your Honor and which is in evidence. [47]

The Court will find that this paper discusses the legal effect of these papers. I do not think that there is anything in this paper that hurts us in the slightest degree.

Mr. NOBLE.—Then does it go in without your objection?

Mr. BREVILLIER.—We will consider that and let you know after recess whether or not we will withdraw our objection.

(Testimoney of Dabney C. D. Davis, Jr.)

Mr. KINGAN.—If the Court please, we want this passed on now.

The COURT.—I am not satisfied that you gentlemen have shown to the Court that you have authority to appear for this corporation.

Mr. BREVILLIER.—Well, there is that telegram which Mr. Hill offered yesterday.

The COURT.—You object to this because you say it is not on behalf of the corporation, and you are here in Court on telegram from a person who says that, so far as he is authorized, you may represent him.

Mr. HILL.—My objection to that, if your Honor please, is that it is simply an attempt to get before this Court the testimony of a man by an *ex parte* affidavit.

Mr. NOBLE.—Oh, no.

Mr. HILL.—That is what it amounts to.

Mr. KINGAN.—It is the same as a letter.

Mr. NOBLE.—Just the same as a letter written by Senator Dorsey.

The COURT.—Gentlemen, the question is now on the admission of this affidavit. Do you object to it?

Mr. BREVILLIER.—We consent to the admission of this paper as a declaration against interest.

Mr. BREVILLIER.—If the Court please, in both answers filed by the Copper Estate in this litigation, there was a statement made that the Copper Estate had conveyed its interest to A. M. Fowler. The original bill stated among other things that the mortgage or the transaction should be foreclosed. The

(Testimony of Dabney C. D. Davis, Jr.)

deed from the Copper Estate to A. M. Fowler was recorded [48] in Santa Cruz County at my request after the action was commenced. A. M. Fowler is my stenographer. I believe Mr. Heath knows that. At one time shortly after this answer was filed Mr. Heath came into my office and asked me whether in case it was desired that A. M. Fowler should be added as a party defendant in this litigation, it could be done. I told him I did not think there would be the slightest difficulty. Mr. Heath has furnished me from time to time in New York with the various papers in the Copper Estate case, and he has talked to me in a general way about it. The deed from the Copper Estate to A. M. Fowler was recorded in Santa Cruz County at my request. The record in that county states, "recorded at the request of G. H. Brevillier." I found the Copper Estate was duly incorporated. Mr. Davis and a gentleman who was acting for me last June went to Los Angeles on the same train. Mr. Davis saw Senator Dorsey before Doctor Root, who was with me in Tucson in June. Then James W. Vroom, President of the Santa Cruz Development Company, who is well acquainted with Senator Dorsey, wrote him and asked him if he would make a deed, if he would sell the land, and after some negotiations the Copper Estate, by Senator Dorsey as its president, made this deed, and received money for so doing.

Now, I asked Mr. Hill if he would appear here, and told him he would get authority from Senator Dorsey. Subsequently Senator Dorsey did send that tele-

(Deposition of Phillip Keep Reynolds.)

gram to Mr. Hill. I never met Senator Dorsey. I never talked to him in my life. As a matter of business policy I thought it advisable to get the deed from the Copper Estate. I found it was incorporated in Yuma County, and the evidence of Philip K. Reynolds bears that out. I have no connection with Philip K. Reynolds. I never saw him until the time of that deposition. I tried to get the papers from him. I offered to pay him for the papers, and he said he couldn't find them. I asked Mr. Heath if he would let me have copies of all [49] papers filed in the Copper Estate case, and he has always done so. Of course, A. M. Fowler holds this title, whatever she got, for the Santa Cruz Development Company. There is the whole thing. It has been thoroughly understood by the plaintiffs, and it has been done absolutely in the open.

Now, I am perfectly willing that A. M. Fowler be added as a party defendant in this litigation. I am perfectly willing that the Santa Cruz Development Company be added as a defendant and that all proceedings apply to it. I am perfectly willing, if they do not wish to do that, to furnish them with a paper, as soon as I can get it, that the decree herein shall bind them, as I look upon this action in effect as an action to foreclose a mortgage.

Mr. HEATH.—We believed from the beginning that Mr. Brevillier was engineering this Arizona Copper Estate business. As I told you in bringing suit we had satisfied ourselves as best we could that the Arizona Copper Estate had been dead from a

month or two after the transaction. We were, therefore, surprised when it came to life and we suspected the source. Mr. Brevillier never gave us any intimation that he had anything to do with it. When Mr. Hill was employed here, we suspected very strongly that he represented Mr. Brevillier, but it was never admitted. When Fowler's name appeared in the record, I went to Mr. Brevillier because I was considering whether it was necessary to make Fowler a party, and I asked Mr. Brevillier who Fowler was, and he declined to answer. I suspected the fact, so I was smiling, but he declined to answer. I happened to look in the adjoining room and I caught the eye of his stenographer, and she smiled, by which I inferred that she was laughing at my guess. I had no idea that she was the person. Then I asked him, thinking he controlled the situation, whether he thought there would be any objection if he wanted to make Fowler a party. He did say he thought there would not be, but he did not say that he represented [50] Fowler. He did not tell me who Fowler was, and although we have inquired of various persons, it was only when I read Vroom's answers to the interrogatories in the nature of discovery that I ascertained that Fowler is Secretary of the Santa Cruz Development Company and lives at Bloomfield, New Jersey, and it isn't even said there that she is Mr. Brevillier's stenographer.

Plaintiffs rested.

Defendants then introduced in evidence without objection Defendant's Exhibit No. 1, being a copy properly exemplified of proper Articles of Incorporation.

poration of the Arizona Copper Estate, recorded in the office of the County Recorder of Yuma County, Arizona, on February 28, 1899, in Book 2 of Bonds and Agreements, page 277, being the book then duly kept for the purpose of recording such articles of incorporation.

Defendants then introduced in evidence without objection Defendant's Exhibit No. 2, being proper proof of publication of the Articles of Incorporation of the Arizona Copper Estate in the Yuma "Sun," a newspaper published in Yuma, Arizona, on April 28, May 5, 12, 19 and 26, and June 2d, 1899.

The defendants then introduced in evidence, Defendants' Exhibit No. 4, a photographic copy, of the petition for rehearing presented in March, 1901, to the Department of the Interior, concededly signed by Alex. F. Mathews as Petitioner and by Conrad H. Syme as attorney, relating to Baca Float No. 3, and which so far as material reads as follows:

[Plaintiffs' Exhibit No. 4—Excerpts from Petition for Rehearing.]

"Shortly anterior to May 6. 1899, your petitioner being the owner of record of Baca Float No. 3, applied 'for the survey of said grant as selected or located in the Territory of Arizona, formerly a part of the Territory of New Mexico.' As no question had ever been [51] made of the legality of the allowance of said 'amended description,' and as your Department had previously expressly decided that it was bound by the location as described in said 'amened description,' your petitioner was not

heard thereupon, and the decision of July 25th, 1899, whereby the allowance of said 'amended description' was declared void, and of no legal effect, was made without your petitioner having an opportunity to present to the Commissioner of the General Land Office or the Secretary of the Interior, his reasons why said 'allowance was valid, legal and effective in law.' "

"Prior to July 25, 1899, your petitioner sold said property, taking notes for the consideration of the same, secured by a mortgage thereupon, upon which notes default has been made largely occasioned by the decision of July 25th, 1899; and your petitioner has only recently been in a position to protect his interest in the premises by this appeal to that 'supervisory authority' vested in the Secretary of the Interior and for the correction of an error in his decision of July 25th, 1899, which has occasioned great damage to your petitioner, and which he feels would not have occurred had he been given opportunity to present his reasons touching the validity in law of the allowance of said 'amended description' of said property by order of the Commissioner of the General Land Office of May 21st, 1866." [52]

Mr. BREVILLIER.—Of course, I do not suppose that the plaintiffs wish to make a claim that there was any other sale or conveyance by Mathews and Syme except in this Copper Estate transaction.

The COURT.—That must refer to that transac-

tion. The objection is overruled. It may be received. Conrad Syme is here and if plaintiffs want to show that it was some other transaction they may have the opportunity.

Mr. BREVILLIER.—If the Court please, we offer in evidence as an admission of plaintiffs against their interest, section 21 of the bill in this case as originally filed.

The COURT.—The Court will take notice of its own records. You may call my attention to it.

The defendant then introduced in evidence Defendant's Exhibit No. 5, an exemplified copy of the testimony of Dabney C. T. Davis, Jr., one of the plaintiffs herein, in another proceeding affecting the property at bar, and which testimony so far as material is as follows:

[Defendants' Exhibit No. 5—Excerpts from Testimony of Dabney C. D. Davis, Jr.]

With reference to the deed of February 8, 1907, (Plaintiff's Exhibit "A," heretofore offered in evidence) in this case, it was agreed between the parties that certain purchase money going to A. F. Mathews, subsequently becoming the interest of the heirs, should be represented by myself and General Watts as Trustees. General Watts and myself are also individually interested. I do not mean to say that they have a technical interest in the land itself, but when the trustees dispose of the property in question some of the proceeds from such sale or disposition would go to such parties.

Mr. BREVILLIER.—Will the plaintiffs concede that there has never been any foreclosure by action or

by any public sale, judicial or otherwise, of the instrument from the Copper Estate to Mathews and Syme, attached to the bill as exhibit No. 2? [53]

Mr. KINGAN.—We will admit, that there has been no foreclosure proceedings in Court, and that no action has been brought upon the notes, of any kind, and that is as far as we will admit.

Mr. BREVILLIER.—Will you also admit that the deed from the Mathews estate and Colonel Syme to Watts and Davis of February 8th, 1907, was not given as the result of a public sale? I mean by a public sale, an advertised sale, a sale on notice; a judicial sale, or any non-judicial sale on advertisement, or on notice to the Copper Estate, or any person in its behalf? Will you so concede?

Mr. KINGAN.—Yes.

Testimony Closed. [54]

Plaintiffs' Exhibits "D-1" to "D-12."

Plaintiffs' Exhibit "D-1" to "D-12," inclusive, consisted of twelve negotiable promissory notes, each dated August 3, 1899, signed by the Arizona Copper Estate by James Simmons, Vice-president, payable at 11 Broadway, New York City, for the following amounts and to the following payees:

Amount.	Payee.	Maturities.
\$5,351.60	Alex. F. Mathews	Feb. 15, 1900
5,351.60	"	July 15, 1900
5,351.60	"	Jan. 15, 1901
10,703.20	"	July 15, 1901
4,000.00	Alex. F. Mathews, Trustee for Miss Eldridge	Feb. 15, 1900
4,000.00	"	July 15, 1900

Amount.	Payee.	Maturities.
4,000.00	"	Jan. 15, 1901
8,000.00	"	July 15, 1901
5,824.20	S. A. M. Syme	Feb. 15, 1900
5,824.00	"	July 15, 1900
5,824.20	"	Jan. 15, 1901
11,648.40	"	July 15, 1901

\$75,879.00

[55]

[Stipulation as to Abstract of Testimony and Exhibits.]

The foregoing abstract of testimony and of certain exhibits is hereby approved as true, complete and properly prepared, and it is hereby stipulated that the same be filed and forthwith certified by the clerk as such in the transcript of record to be sent to the United States Circuit Court of Appeals for the Ninth Circuit on the appeal herein of the defendant, Arizona Copper Estate.

Notice of filing and of presentation to the Court or Judge for approval is hereby waived.

Dated June 11, 1915.

HARTWELL P. HEATH,
Solicitors for Plaintiffs.

BEN C. HILL,

Solicitor for Defendant, Arizona Copper Estate.

(In Pencil):

Mr. Heath's approval is subject to the signature of Mr. Kingan.

[Order Approving Abstract of Testimony and Exhibits.]

The foregoing abstract of testimony and of certain exhibits is hereby approved as true, complete and properly prepared.

Dated Sept. 3d, 1915.

WM. H. SAWTELLE,

Judge of the United States District Court for the District of Arizona.

[Endorsements]: United States District Court, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, Against Arizona Copper Estate et al., Defendants. Original Approved Abstract of Testimony and of Certain Exhibits. Ben C. Hill, Solicitor for Arizona Copper Estate, Tucson, Arizona. Filed Sept. 3, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy.
[56]

Decree.

In the District Court of the United States in and for the District of Arizona.

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE BOYCE, W. TRUXTON BOYCE, URIEL WRIGHT BOYCE, and U. LAWRENCE JONES.

Defendants.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it is by the Court this 2d day of April, 1915, found:

That on or about August 3, 1899, Alexander F. Mathews and Samuel A. M. Syme executed and delivered a deed of conveyance of that date to the defendant, Arizona Copper Estate, of the following described tract of land situated in Santa Cruz County (formerly Pima County), Arizona, to wit:

Commencing at a point one mile and a half from the base of Salero Mountain in a direction north forty-five degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles, thirty-six chains and forty-four links; thence south twelve miles, thirty-six chains and forty-four links; thence east twelve miles, thirty-six chains and forty-four links and thence north twelve miles, thirty-six chains and forty-four links to the place of beginning.

That, at the same time and as part of the same transaction, the defendant, Arizona Copper Estate, executed and delivered to said Alexander F. Mathews and Samuel A. M. Syme a paper writing bearing the same date by which it purported to reconvey said land to said Mathews and Syme with a proviso that, if certain notes of the Arizona Copper Estate therein recited aggregating \$100,000.00 and delivered therewith [57] were paid according to their tenor and effect, such conveyance should be void and the estate thereby created should cease,

determine and be void;

That said deed and said paper writing were recorder simultaneously in the office of the recorder of Pima County, Arizona, in Book 31 of Deeds of Real Estate at page 103, and in Book 15 of Mortgages at page 60, respectively, and said deed was thereafter duly recorded in the office of the recorder of Santa Cruz County, Arizona;

That the two recorded instruments aforesaid are to be construed as one instrument and constitute a conditional sale of the land hereinbefore described by said Mathews and Syme to the defendant, Arizona Copper Estate, for \$100,000.00, to be paid according to the tenor and effect of the notes hereinbefore referred to;

That the condition was not performed and that no part of said sum of one hundred thousand dollars has ever been paid;

That the defendant Arizona Copper Estate acquired and has no right, title, interest, or estate under or by virtue of the aforesaid instruments or either of them or otherwise, or in and to the land hereinbefore described, or any part thereof;

That the defendants, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and U. Lawrence Jones are all heirs of U. L. Boyce, deceased;

That the said U. L. Boyce, deceased, acquired, and defendants, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and U. Lawrence Jones have no right, title, interest or estate under or by virtue of the aforesaid instruments, or either of them, or otherwise, in or to the land hereinbefore [58] de-

scribed, or any part thereof;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the full legal title to the land hereinbefore described is in the plaintiffs; and it is further

ORDERED, ADJUDGED AND DECREED that the aforesaid recorded instruments, dated August 3, 1899, and recorded in the office of the recorder of Pima County, Arizona, in Book 15 of Mortgages at page 60 and Book 31 of Deeds of Real Estate at page 103, respectively, and the latter of which is also recorded in the office of the recorder of Santa Cruz County, Arizona, constitute a cloud upon the title of the plaintiffs herein to the land hereinbefore described; and it is further

ORDERED, ADJUDGED AND DECREED that the aforesaid instruments be and the same hereby removed as a cloud upon the title of the plaintiffs to the hereinbefore described land; and that the title of the plaintiffs to the land hereinbefore described be, and the same hereby is, quieted in the plaintiffs against the defendants Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, and each of them, and all persons claiming under them or any of them; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and U. Lawrence Jones, and each and every one of them, and all persons claiming under them, or any of them, be barred and forever estopped from having or

claiming any right or title to the land hereinbefore described adverse to the plaintiffs; and it is further [59]

ORDERED, ADJUDGED AND DECREED that a certified copy of this decree be filed and recorded in the office of the recorder for Santa Cruz County, Arizona; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs have judgments for their costs and disbursements against the defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiffs may have leave to apply at the foot of this decree for such other and further relief as may be proper.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In Equity E-4 (Tucson). U. S. District Court, District of Arizona. Cornelius C. Watts, et al., Plaintiffs, vs. Arizona Copper Estate, et al., Defendants. Proposed Decree. S. L. Kingan and Hartwell P. Heath, Solicitors for Plaintiffs. Filed April 2, A. D., 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [60]

**(Plaintiff's Exhibit "A"—Deed, February 8, 1907,
Syme et al. to Watts et al.)**

THIS DEED, Made this, the eighth day of February, 1907, between Samuel A. M. Syme, of the city of Washington, D. C., and Laura G. Mathews, Eliza Patton Mathews, Mason Mathews, Charles G. Mathews and Henry A. Mathews, devisees of Alexander F. Mathews, deceased, acting in their individual

capacity and the said Mason Mathews, Charles G. Mathews and Henry A. Mathews, acting in their capacity of executors of the will of Alexander F. Mathews, deceased, grantors, parties of the first part, and C. C. Watts and D. C. T. Davis, Jr., trustees, bith of Charleston, West Virginia, parties of the second part,

Witnesseth, that for and in consideration of the sum of Four thousand (\$4,000.) Dollars in money and other valuable considerations paid and to be paid by the parties of the second part to the parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part have bargained, sold and do hereby grant and convey with covenants of special warranty unto the parties of the second part, their successors and assigns forever all that certain tract or parcel of land and all their right, title and interest, both legal and equitable therein, situate, lying and being in the Counties of Pima, Santa Cruz, in the territory of Arizona, known as Baca Float No. 3, and granted to the heirs of Luis Maria Baca, by the United States by act of Congress approved June 21, 1860, and afterwards conveyed by the said Bacco heirs to John S. Watts by deed bearing date the first day of May, 1864, and recorded May 14, 1864 in the Office of the Court of Pruebas of the County of Santa Fee, territory of New Mexico, in book "C" at pages in said book marked 551, 552, 553, 554 and 555, and also recorded in the office of the Court of Pruebas of the County of San Miguel, territory of New Mexico in the 3d book of documents at pages marked 51, 52, 53, 54, 55, 56,

57 and 58, August 24, 1866 and bounded and described as follows: [61]

Commencing at a point one mile and a half from the base of the Salero Mountain in a direction north 45 degrees east of the highest point of said mountain, running thence from said beginning point west twelve miles 36 chains and 44 links, thence south 12 miles, 36 chains and 44 links, thence east 12 miles 36 chains and 44 links, thence north 12 miles 36 chains and 44 links to the place of beginning, containing 99,289 acres and $39/100$ of an acre more or less, the said tract of land being known as Bacco Float No. 3, including in this conveyance all the rights and claims of the heirs of the said Baca, and of all persons claiming under them, that is to say, all the right, title and interest of the said parties of the first part to said Baca Float No. 3 as above described or to any land located elsewhere in lieu thereof, under act of Congress approved on June 21, 1860, or under any decision of any department of the government made or hereafter to be made or act of Congress passed or to be passed.

This conveyance is made with the express power to the said parties of the second part to sell, convey, to lease, mortgage or otherwise dispose of the said Real Estate or any part thereof, as to them may seem best and the purchaser or purchasers in case of such sale shall not be required to see to the application or disposition of the purchase money and shall be held acquit of any responsibility.

It is further covenanted and agreed that the parties of the first part will give to the parties of the

second part such other and further deeds and assurances as in their judgment be necessary to carry into effect the provisions of this deed.

In witness whereof the parties hereto of the first part have hereunto set their hands and affixed their respective seals this 8th day of February, A. D., 1907.

Witness to S. A. M. Syme's signature.

A. GUMPERT,	
C. M. COLLINS,	
L. B. BATTLE,	
S. A. M. SYME,	(Seal.)
ELIZA PATTON MATHEWS,	(Seal.)
LAURA G. MATHEWS,	(Seal.)
MASON MATHEWS,	(Seal.)
MASON MATHEWS, Exr.	(Seal.)
C. G. MATHEWS,	(Seal.)
C. G. MATHEWS, Exr.	(Seal.)
HENRY A. MATHEWS,	(Seal.)
HENRY A. MATHEWS, Exr.	(Seal.)

[62]

District of Columbia,

County of Washington,—To wit:

I, F. J. Whitehead, a Notary Public in and for the District of Columbia, do hereby certify that this day personally appeared before me in the district aforesaid Samuel A. M. Syme personally known to me to be the same person described in and who executed the foregoing and annexed instrument in writing and duly acknowledged to me that he had executed the same for the uses and purposes therein mentioned and that the same was his free and voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal this 11th day of February, 1907.

[N. P. Seal.]

F. J. WHITEHEAD,

Notary Public, D. C.

State of West Va.,

County of Greenbrier,—ss.

I, W E. Nelson, a Notary Public in and for the County and State aforesaid, do hereby certify that this day personally appeared before me in the State and County aforesaid, Laura G. Mathews, Eliza Patton Mathews, Mason Mathews, Charles G. Mathews and Henry A. Mathews, personally known to me to be the same persons described in and who executed the foregoing and annexed instrument in writing and duly acknowledged to me, the last named three in their individual and also in their executorial capacity, that they had executed the same for the uses and purposes therein mentioned and that the same was their free and voluntary act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal this the 8th day of February, 1907.

[N. P. Seal.]

W. E. NELSON,

Notary Public. [63]

Filed and recorded at request of Noble, Esterbrook & McHarg, Mar. 20, A. D., 1914, at 4:15 P. M.

PHIL HEROLD,

County Recorder.

[Endorsements]: Plffs. Ex. "A." in E-4. Admitted and Filed March 25, 1915. George W. Lewis, Clerk. [64]

**(Plaintiffs' Exhibit "B"—Deed, August 3, 1899,
Mathews et al., to Arizona Copper Estate.)**

THIS DEED, Made this third day of August, A. D., 1899, between Alexander F. Mathews of the town of Lewisburg, State of West Virginia, and S. A. M. Syme of the city of Washington, District of Columbia, parties of the first part and The Arizona Copper Estate, a corporation, organized under the laws of the territory of Arizona, party of the second part.

WITNESSETH, that the said parties of the first part have in consideration of the sum of Ten Dollars to them in hand paid by the party of the second part, before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged and other good and valuable considerations, have remised, released and quit claimed and by these presents do remise, release and quit claim unto the said party of the second part, its successors and assigns, all that certain tract or parcel of land situate in the southern part of the County of Pima and territory of Arizona, known as Baca Float No. 3 and more particularly described in the records of the United States Land Office and Surveyor General's Office at Tucson in the said territory of Arizona and in the United States General Land Office in the said city of Washington, District of Columbia, to which records reference is here made for such particular description and which tract contains 99,000 acres

more or less, together with all and singular, the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining and all the estate, right title, interest, claim and demand of the said parties of the first part, of, in or to the above described premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above-named and described premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever, and the said parties of the first part, for themselves, their heirs, executors and administrators, do hereby covenant, promise and agree to and with the said party of the second part, its [65] successors, and assigns, that the said premises against the claim of all persons claiming to claim by, through, or under them only, they will forever warrant and deed.

IN WITNESS WHEREOF the said parties of the first part have hereunto set their hands and seals this, the 3d day of August, A. D., 1899.

ALEX. F. MATHEWS. (Seal.)

S. A. M. SYME. (Seal.)

Witness: P. K. REYNOLDS.

(\$125.00 U. S. Int. Revenue Stamps.)

City of New York,

County and State of New York,—ss.

Before me, James Simmons, a Notary Public in and for the said County and State aforesaid, on this day personally appeared Alexander F. Mathews and S. A. M. Syme, personally known to me to be the persons described in and who executed the foregoing

instrument, and they and each of them acknowledged to me that they and each of them executed the same for the purposes and considerations therein expressed.

Given under my hand and seal of office this the 3d day of August, A. D., 1899.

JAMES SIMMONS,
Notary Public.

My commission expires March 30, 1901.

Filed and recorded at request of Phillip K. Reynolds August 12, A. D. 1899, at 9 A. M.

CHAS. A. SHIBELL,
County Recorder.

Recorded Book 31 Deeds of Real Estate at page 103 et seq. Pima County, Arizona records. [66]

State of Arizona,
County of Pima,—ss.

I, P. E. Howell, County Recorder in and for the County of Pima, do hereby certify that the above and foregoing is a full, true and correct copy of the deed from Alexander F. Mathews and S. A. M. Syme, to the Arizona Copper Estate of date August 3, 1899, as appears of record now in my office in Book 31 Deeds of Real Estate, page 103 et seq.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in Tucson this 26th day of March, A. D. 1913.

[Seal]

P. E. HOWELL,
County Recorder of Pima County, Arizona.

Filed and recorded at the request of G. H. Brevillier July 20, 1914, at 9 A. M.

PHIL HEROLD,
County Recorder.

[Endorsements]: U. S. District Court, District of Arizona. No. E-4 (Tucson). Cornelius C. Watts, et al., vs. Arizona Copper Estate, et al. Incorporated at pages 93, et seq. of and as Exhibit No. 1 to Deposition of Samuel A. M. Syme Taken on Behalf of the Plaintiffs, October 12, 1914, at Washington, D. C., Before Wm. H. Harper, Notary Public. Alexander F. Mathews and S. A. M. Syme, to Arizona Copper Estate. Deed. Dated August 3, 1899. Fitch, Slater & Randall, Attorneys and Counselors at Law, 30 Broad St., New York. [67]

United States of America,
State of Arizona,
County of Santa Cruz,—ss.

I, Phil Herold, County Recorder in and for the County of Santa Cruz, Arizona, do hereby certify that the above and foregoing and attached paper, page 1 to 3 inc., is a full, true and correct copy of the deed from Alexander F. Mathews and S. A. M. Syme to Arizona Copper Estate, of date August 3, 1899, as appears of record now in my office in Book 7, Deeds Real Estate, Pages 625 et seq.

In witness whereof I have hereunto set my hand and affixed my official seal at my office in Nogales, Arizona, this 3d day of Dec. 1914.

PHIL HEROLD,
County Recorder of Santa Cruz County, Arizona.

[Recorder's Seal.]

(Two Five Cent Revenue Stamps.)

United States of America,
State of Arizona,
County of Santa Cruz,—ss.

I, W. A. O'CONNOR, Judge of the Superior Court of the State of Arizona, in and for the County of Santa Cruz, do hereby certify that Phil Herold whose name is subscribed to the foregoing certificate of Attestation, now is and was at the time of signing and sealing the same, County Recorder of said County of Santa Cruz and keeper of the seal and records of said office, duly elected, commissioned and qualified to office; that full faith and credit are, and of a right ought to be given to all his official acts as such in all courts of record in the United States and elsewhere; and that his attestation is in due form of law and by the proper officer.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at the City of Nogales, in said County of Santa Cruz and State of Arizona, this 3d day of December, 1914.

W. A. O'CONNOR,
Judge of the Superior Court of the State of Arizona,
in and for the County of Santa Cruz.

[Court Seal.] [68]

(Two Five Cent Revenue Stamps.)

United States of America,
State of Arizona,
County of Santa Cruz,—ss.

I, Edward L. Mix, Clerk of the Superior Court of the State of Arizona, in and for the County of Santa Cruz, do hereby certify that W. A. O'Connor whose

name is subscribed to the foregoing Certificate of Attestation, now is, and was at the time of signing and sealing the same, Judge of the Superior Court of the State of Arizona, in and for the County of Santa Cruz and was duly elected, commissioned and qualified to office; that full faith and credit are, and of right ought to be, given to all his official acts as such in all courts of record in the United States and elsewhere, and that his attestation is in due form of law and by the proper officer.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Nogales, in said County of Santa Cruz and State of Arizona, this 3d day of December, 1914.

EDW. L. MIX,

Clerk of the Superior Court of the State of Arizona
in and for the County of Santa Cruz.

[Seal of Court.]

(Two Five Cent Revenue Stamps.)

[Endorsements]: Plaintiff's Exhibit "B" in E-4. Admitted and filed March 25, 1915. George W. Lewis, Clerk.[69]

(Plaintiffs' Exhibit "C"—Indenture, August 3, 1899, Arizona Copper Estate and Mathews et al.)

THIS INDENTURE Made the third day of August in the year Eighteen Hundred and ninety-nine between The Arizona Copper Estate, a corporation organized and existing by virtue of the laws of the territory of Arizona, with an office in the city of New York, party of the first part and Alexander F. Mathews of Greenbrier County, West Virginia and

S. A. M. Syme of Alexandria, Virginia, parties of the second part;

WITNESSETH, That the said party of the first part in consideration of the sum of Ten (\$10.00) Dollars lawful money of the United States paid by the said parties of the second part, does hereby grant and release unto the said parties of the second part and to their representatives and assigns forever, all that certain tract or parcel of land situated in the Southern part of the County of Pima and territory of Arizona, known as Baca Float No. 3 and more particularly described in the records of the United States Land Office and Surveyor General's Office at Tuscon in the said territory of Arizona and in the United States General Land Office in the said city of Washington, District of Columbia, to which records reference is here made for such particular description and which tract contains ninety-nine thousand (99,000) acres more or less, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining and all the estate, right, title, interest, claim and demand of the said parties of the first part, of, in, or to the above described premises and every part and parcel thereof with the appurtenances, to have and to hold all and singular the above-named and described premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever.

Whereas, the party of the first part has executed certain promissory notes aggregating the sum of One Hundred Thousand (\$100,000.) Dollars, payable

according to the terms and tenor thereof, to wit:
[70]

Three notes for \$4,824.20, three notes for \$5,351.60, three notes for \$5,824.20, and three notes for \$4,000 each, each of said sets of notes falling due respectively on February 15th, 1900, July 15th, 1900, January 15th, 1901, also one note for \$9,648.40, one for \$10,703.20 and one for \$11,648.40 and one for \$8,000, all of said notes being due and payable on the 15th day of July, 1901, all of the above-described notes having been executed to Alexander F. Mathews, S. A. M. Syme, U. L. Boyce and Alexander F. Mathews, trustee, respectively, as will fully appear on the face of said notes, together with the appurtenances and all the estate and rights of the said party of the first part in and to said premises.

(\$46.50
U. S. Int.
Revenue
Stamps.)

To have and to hold the above-granted premises unto the said parties of the second part, their heirs and assigns forever. Provided always that if said notes are paid according to their tenor and effect, then these presents shall become void and the estate hereby granted shall cease determine and be void, otherwise to remain in full force and effect and the said party of the first part covenants with the said parties of the second part that the party of the first part will pay the indebtedness as hereinbefore provided and if default be made in the payment of any part thereof the said parties of the second part shall have power to sell the premises herein described according to law.

In witness whereof the said party of the first part

has caused its President and Secretary to execute the foregoing indenture for and in behalf of the corporation and to attach the corporate seal hereto.

THE ARIZONA COPPER ESTATE (Seal)

By JAMES SIMMONS,

Vice-President.

[Seal]

PHILIP K. REYNOLDS,

Secretary. [71]

State of New York,

County of New York,—ss:

On this third day of August in the year Eighteen Hundred, before me, personally came James Simmons and Philip K. Reynolds, respectively Vice-president and Secretary of the Arizona Copper Estate, a corporation, to me known and known to me to be the individuals described in and who executed the foregoing indenture and they thereupon have acknowledged to me that they executed the same for and in behalf of said corporation in compliance with the order of its Board of Directors thereof for the purposes and considerations therein set forth.

[Seal]

SHERMAN W. FORD,

Notary Public No. 40 N. Y. Co.

Territory of Arizona,

County of Pima.

I hereby certify that the within instrument was filed and recorded Aug. 12, A. D. 1899, at 9 A. M. in Book 15 Mortgages at Page 60, 61, 62.

Witness my hand and Official Seal the day and year aforesaid.

CHAS. A. SHIBELL,

County Recorder.

[Endorsements]: Pltfs. Ex. "C" in E-4. Admitted and filed March 25, 1915. George W. Lewis, Clerk. [72]

(Plaintiffs Exhibit "S"—Affidavit of Stephen E. Dorsey.)

State of California,
County of Los Angeles,—ss.

Stephen E. Dorsey, being duly sworn says; I am now a resident of Los Angeles, California: in 1899 I was in New York City and there was induced by Col. U. L. Boyce, whom I had previously known in Washington, to consider the purchase of Baca Float No. 3: it was represented to me that those for whom Col. Boyce was acting could give a good title to the property; that it was a valuable property and could be handled profitably by a purchaser. I was somewhat familiar with conditions in Arizona and New Mexico and had reason to believe that what I was told about this property was in the main true. After some negotiations, I met Col. S. A. M. Syme, who told me that he was in a position to procure a deed to the property to be made to me or to any one I might designate. It was finally agreed that the purchase price of the property should be One Hundred Thousand (\$100,000.) Dollars, to be paid in various sums and at various times running over about two years. My plan was to form a corporation to which the property could be deeded and which could then raise on the property a sum sufficient to pay the purchase price. It was, therefore, arranged that the property should be deeded to the corporation, but as the sale was not to be made unless and until the price

was paid, it was arranged that the corporation would reconvey the property to the then owners subject to divestiture if the purchase price was paid as agreed.

I interested some of my friends in the matter, among them, Mr. James Simmons and Philip K. Reynolds, and we had the papers prepared for the organization under the laws of Arizona of a corporation under the name of The Arizona Copper Estate. On or about August 3rd, 1899, Alexander F. Mathews and Samuel A. M. Syme deeded the property to The Arizona Copper Estate, and the Arizona Copper Estate made a reconveyance of the property on the same day to the said Mathews and Syme, which recited that certain notes had [73] been executed by the Arizona Copper Estate to said Mathews and Syme and to Col. Boyce as the broker in the transaction, amounting in the aggregate to One Hundred Thousand (\$100,000) Dollars and providing that if said notes were paid the reconveyance was to be void, otherwise to be and remain in full force and effect.

This form was adopted as the simplest and the one which would enable the corporation to handle the property easiest in raising the money required. There was never any intention that in case the corporation should not be able to raise the money, it should be indebted to those named in the amount of the notes or in any amount. All the parties knew that the corporation was to be organized to handle this proposition and that it had and expected to have

no other assets but what it could make out of this property.

Soon after the deeds were made, I went to the Interior Department at Washington, D. C., to investigate the condition of the title to the Float. Before starting the corporation going, but after consulting fully with the attorney for the Land Office, found out that the title to the property was so complicated that nothing could be done with it in a commercial way and I then and there decided to abandon the whole transaction. I had already recorded the two deeds but I did not complete the organization of the corporation.

Nothing further was done in the matter by me or my associates and my understanding has always been and is now that the transaction on account of the failure of the Arizona Copper Estate to make the payments agreed on was as though it had never taken place and that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation or of the Arizona Copper Estate itself, as it could have no claim because it never in fact existed. The above statement is in accordance with my best recollection.

STEPHEN W. DORSEY. [74]

Subscribed and sworn to before me this 20th day of June, 1914.

My commission expires October 21, 1915.

[Seal]

MIRANDA W. OLDS,

Notary Public in and for Los Angeles County, State of California.

[Endorsements]: Pltfs. Ex. "F" in E-4. Admitted and Filed March 26, 1915. George W. Lewis, Clerk. [75]

(Notice of Appeal and Demand to Join in Application for Appeal.)

In the District Court of the United States in and for the District of Arizona.

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE BOYCE, W. TRUXTON BOYCE, URIEL WRIGHT BOYCE, and U. LAWRENCE JONES,

Defendants.

To John B. Wright, Esq., Solicitor for Defendants, Boyce and Jones:—

You are hereby notified that the undersigned will apply to Hon. WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, in the courtroom of said Court at Tucson, Arizona, on May 7th, 1915, at 10 o'clock A. M. for an order allowing the Arizona Copper Estate to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered herein on April 2, 1915, when and where you may attend and join in said appeal, and the undersigned demands,

requests and notifies you to join in the application for such appeal.

Dated, Tucson, Arizona, May 6, 1915.

BEN C. HILL,
Solicitor for Arizona Copper Estate.

[Endorsements]: United States District Court, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, against Arizona Copper Estate, et al, Defendants. Original Notice to Other Defendants to Appeal, etc. Ben C. Hill, Solicitor for Defendant, Arizona Copper Estate, Tucson, Arizona, Due and Timely Service of a Copy of the Within Notice is Hereby Admitted. Dated May 6th, 1915. John B. Wright, Solicitor for Defendants, Boyce and Jones. Filed May 10, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [76]

[Petition for, and Order Allowing Appeal, etc.]

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE and U. LAWRENCE
JONES,

Defendants,

To the United States District Court for the District of Arizona:

The above-named defendant, Arizona Copper Estate, conceiving itself aggrieved by the decree entered on the 2d day of April, 1915, in the above-entitled case, and having given notice of its intention to appeal to the Solicitor for the other defendants, and said other defendants refusing to join in this appeal, hereby appeals from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 6, 1915.

BEN C. HILL,

Solicitor for Defendant, Arizona Copper Estate.

And now, to wit, May 10, 1915, it is ORDERED that the foregoing appeal be allowed as prayed for upon giving bond in the sum of Two Hundred Fifty (\$250.00) Dollars for costs on appeal.

WILLIAM H. SAWTELLE,

District Judge. [77]

[Endorsements]: United States District Court, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiff, Against Arizona Copper Estate et al., Defendants. Original Petition and Order Allowing Appeal. Ben C. Hill, Solicitor for defendant, Arizona Copper Estate, Tucson, Arizona. Filed May 10th, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. Service

of Copy Admitted May 6-15. S. L. Kingan, Attorney for Plaintiff. [78]

(Assignment of Errors.)

*In the District Court of the United States, in and for
the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE and U. LAWRENCE
JONES,

Defendants,

The undersigned appellant hereby assigns the following errors in the rulings, decision and decree of the Court in the above-entitled case:

First. The Court erred in finding and decreeing that the deed of Conveyance from Alexander F. Mathews and Samuel A. M. Syme to Arizona Copper Estate and the instrument of reconveyance executed by Arizona Copper Estate to said Mathews and Syme recorded in the Recorder's Office of Pima County, Arizona, in Book 15 of Mortgages, page 60, and hereinafter referred to as the "reconveyance," are to be construed as one instrument and constitute a conditional sale of the land referred to therein.

Second. The Court erred in not finding and de-

creeing that said reconveyance was a mortgage.

Third. The Court erred in admitting and considering any testimony or evidence as to the meaning, construction or contemplated legal effect of the said reconveyance, or the intention of the parties with reference to said reconveyance or the \$100,000, of notes recited therein.

Fourth. The Court erred in admitting and considering the testimony of Samuel A. M. Syme to the effect that it was the understanding and intention of the parties to said reconveyance [79] that in case the \$100,000 of notes recited therein were not paid according to their tenor and effect, the land described in said reconveyance should be the property of the grantees therein; that the sale was not to be deemed made unless and until said notes and all of them were paid, and that in case said notes were not paid they, as well as said deed and reconveyance were to be void.

Fifth. The Court erred in finding and decreeing that said Arizona Copper Estate acquired no interest or estate to the land described in the decree under said deed and reconveyance, and that they constitute a cloud on plaintiff's title.

Sixth. The Court erred in finding and decreeing that the full legal title to said land was in the plaintiffs, and barring the defendants and their successors in interest from asserting any interest or title under said deed and reconveyance.

Seventh. The Court erred in not finding and decreeing that said reconveyance and the notes recited therein were barred by the Arizona Statutes of Limitation.

Eighth. The Court erred in not finding and decreeing that all relief of the plaintiffs was barred by the Arizona Statutes of Limitation.

Ninth. The Court erred in not dismissing the bill on the merits.

WHEREFORE, appellants pray that the decree be reversed and the Bill dismissed on the merits.

BEN C. HILL,
Solicitor for Arizona Copper Estate.

[Endorsements]: United States District Court, District of Arizona, Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, Against Arizona Copper Estate et al., Defendants. Original Assignments of Error. Filed May 10, A. D., 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. Service of Copy Admitted May 6, 1915. S. L. Kingan, Atty. for Plaintiff. [80]

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE and U. LAWRENCE
JONES,

Defendants,

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That American Surety Company, a corporation, duly incorporated under and by virtue of the State of New York and authorized by its charter and by law to become sole surety on bonds and undertakings in the above-entitled court, is held and firmly bound unto Cornelius C. Watts and Dabney C. T. Davis, Jr., in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to the said Cornelius C. Watts and Dabney C. T. Davis, Jr., their and each of their executors, administrators or assigns and for which payment the said American Surety Company binds itself by these presents:

IN WITNESS WHEREOF, the said American Surety Company of New York has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with its seal on this eleventh day of May in the year of our Lord one thousand nine hundred and fifteen (1915).

Whereas in the District Court of the United States for the District of Arizona in a suit pending in said court between Cornelius C. Watts and Dabney C. T. Davis, Jr., as plaintiffs, and Arizona Copper Estate and others, defendants, a decree in favor of the plaintiffs was entered on the second day of April, 1915, and the said Arizona Copper Estate having been given due permission from said Court to appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit; [81] now, the condition of the above obligation is such that if the said

Arizona Copper Estate shall prosecute such appeal to effect and answer all damages and costs if it fails to make its appeal good, then the above obligation to be void, otherwise to remain in full force and virtue.

[Seal] AMERICAN SURETY COMPANY.

By HARRY E. HEIGHTON,
Resident Vice-president.

Attest: FRANCIS M. HARTMAN,
Resident Assistant Secretary.

Approved May 11, 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. Cornelius C. Watts and C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate et al., Defendants. Undertaking on Appeal. In Equity—E-4. (Tucson). Filed May 12, A. D. 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk. [82]

(Praeceptum for Transcript of Record on Appeal.)

United States District Court, District of Arizona.

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,
ARIZONA COPPER ESTATE et al.,
Defendants,

To the Clerk of the United States District Court for
the District of Arizona.

You will please prepare a transcript of the record

in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under an appeal perfected to said Court in said cause and include in said transcript only the following proceedings, pleadings, papers and records to wit:

1. Plaintiffs' Bill, Excluding Exhibits Annexed Thereto.

2. First Amendment to Bill and Stipulation Therefor.

3. Second Amendment to Bill,

4. Third Amendment to Bill.

5. Amended Answer of Arizona Copper Estate.

6. Stipulation Filed September 22, 1914 That Amended Answer of Arizona Copper Estate be Taken as Answer to Amended Bill of Complaint.

7. Stipulation Filed February 20, 1915, as to Mathews and Syme.

8. Abstract of Testimony and of Certain Exhibits Therein Referred to.

9. Decree of Court, Dated April 2, 1915.

10. Plaintiff's Exhibit "A,"

11. " " "B,"

12. " " "C,"

13. " " "F,"

14. Notice by Arizona Copper Estate to Other Defendants to Appeal.

15. Petition and Order Allowing Arizona Copper Estate to Appeal.

16. Assignment of Errors.

17. Bond on Appeal with Approval.

18. Citation on Appeal with Proof of Service.

19. Praecipe for Transcript of Record.

20. Order Enlarging Time to File Record.

21. Authorization of Arizona Copper Estate to Ben C. Hill, Filed May 10, 1915. [83]

You will prepare, certify and forward said transcript as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated June, 1915.

BEN C. HILL,

Solicitor for Defendant, Arizona Copper Estate.

The foregoing Praecipe is approved. We shall not file any praecipe.

HARTWELL P. HEATH,

Solicitor for Plaintiffs.

[Endorsements]: United States District Court, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, against Arizona Copper Estate, et al., Defendants. Original Approved Praecipe for Record on Appeal. Ben C. Hill, Solicitor for Arizona Copper Estate, Tucson, Arizona. Filed Sept. 16, 1915. George W. Lewis, Clerk. [84]

*In the District Court of the United States for the
District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS, and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and U. LAWRENCE
JONES,

Defendants.

**Order Extending Time to (September 28, 1915 to)
File Record and Docket Appeal.**

It appearing to the Court that the Arizona Copper Estate, a corporation, was heretofore on the 10th day of May, 1915, allowed an appeal to the Circuit Court of Appeals at San Francisco, and that various orders have heretofore been made extending the time therefor to September 18th, 1915, and that it is impossible for such appeal to be perfected within the time heretofore allowed.

IT IS HEREBY ORDERED that the time within which the said defendant, Arizona Copper Estate, shall be required to file the record in the above-entitled case and docket the appeal therein with the Clerk of the Circuit Court of Appeals at San Francisco, California, be and the same is hereby extended to the 28th day of September, 1915.

Dated this 16th day of September, 1915.

WM. H. SAWTELLE,

Judge.

[Endorsements]: In the District Court of the United States for the District of Arizona. Cornelius C. Watts, and Dabney C. T. Davis, Jr., Plaintiffs, vs. The Arizona Copper Estate. U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, Defendants. In Equity No. E-4 Tucson. Order Extending Time to File Record and Docket Appeal Until September 18th, 1915. Filed September 16th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [85]

**(Confirmation of Authority to Appear for Arizona
Copper Estate, etc.)**

Los Angeles, Cal., April 3, 1915.

Mr. BEN C. HILL,

Tucson, Arizona.

Dear Sir:

This will confirm the authority which we gave you by telegraph to appear for the undersigned corporation in an action in the United States District Court of Arizona, Watts & Davis, Plaintiff and the Arizona Copper Estate et al., Defendants, and to defend the action, and we also authorize you to appeal the case to the Circuit Court of Appeals, and to act for us therein, until the final determination of the case

and take all necessary steps therein.

THE ARIZONA COPPER ESTATE.

By STEPHEN W. DORSEY,

President.

WITNESS:

BREVILLIER.

[Endorsement]: Filed May 10, 1915. E-4,
Tucson. George W. Lewis, Clerk. [86]

(Certificate of Clerk U. S. District Court to
Transcript of Record.)

*In the United States District Court for the District
of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS, and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and U. LAWRENCE
JONES,

Defendants.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States
District Court for the District of Arizona, do hereby
certify that the foregoing pages, number one to
eighty-six inclusive, constitute and are a true, com-
plete and correct copy of the record, pleadings and

proceedings had in the case of Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce, and U. Lawrence Jones, Defendants, No. E-4. (Tucson), as the same is called for in the Praeceptum, a copy of which is made a part of this transcript, as the same remain on file and of record in said District Court, and I also annex and transmit herewith the Original Citation in said Action.

I further certify that the cost of preparing and certifying to said record amounts to the sum of \$47.10, and that the same has been paid in full by the Arizona Copper Estate.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Tucson, in said District, this [87] 25th day of September, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States of America, the one hundred and forty.

[Seal]

GEORGE W. LEWIS,

Clerk United States District Court, District of
Arizona.

By EFFIE D. BOTTS,

Deputy Clerk. [88]

[Citation on Appeal (Original).]

*In the District Court of the United States in and
for the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

against

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE and U. LAWRENCE
JONES,

Defendants,

United States of America,

To Cornelius C. Watts and Dabney C. T. Davis, Jr.,
Greeting:

You are hereby notified that in a certain case in Equity in the United States District Court in and for the District of Arizona, wherein Cornelius C. Watts and Dabney C. T. Davis, Jr., are complainants, and Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, are defendants, an appeal has been allowed the Arizona Copper Estate therein to the Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be in said Court at San Francisco thirty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be cor-

rected and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM H. SAWTELLE, Judge of the United States District Court for the District of Arizona, this 11th day of May, A. D. 1915.

WM. H. SAWTELLE,
United States District Judge.

Service of the foregoing citation hereby acknowledged this 11th day of May, A. D., 1915, at Tucson, Arizona.

S. L. KINGAN,
Solicitor for CORNELIUS C. WATTS and DABNEY C. T. DAVIS, Jr. [89]

In the District Court of the United States in and for the District of Arizona. Cornelius C. Watts and C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate et al., Defendants. In Equity E-4 (Tucson.) Citation on Appeal. Filed May 12, A. D. 1915, at — M. George W. Lewis, Clerk. By Effie D. Botts, Deputy Clerk.

[Endorsed]: No. 2663. United States Circuit Court of Appeals for the Ninth Circuit. Original Citation on Appeal. Filed Sep. 27, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States in and
for the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

against

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE and U. LAWRENCE
JONES,

Defendants,

**Order Extending to (July 10, 1915 to) File Record
and Docket Appeal.**

Upon reading the motion of Arizona Copper Estate, a corporation, praying that an order be entered granting it further time in which to file the record and docket the case in the Circuit Court of Appeals of San Francisco, California, under the order of appeal allowed on May 10th, 1915, and for good cause shown, and there being no objection thereto:

IT IS HEREBY ORDERED that the time within which said defendant, Arizona Copper Estate, shall be required to file the record in the above-entitled case and docket the case with the Clerk of the Circuit Court of Appeals at San Francisco, California, be and the same is hereby enlarged and extended to the tenth day of July, 1915.

Dated this 7th day of June, A. D. 1915.

WM. H. SAWTELLE,
Judge.

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order extending time to file record and docket on appeal in the case of Cornelius C. Watts et al., vs. Arizona Copper Estate et al., No. E-4 (Tucson), as the same appears from the original on file and of record in this office.

WITNESS my hand and the seal of said court affixed hereto this 21st day of June, A. D. 1915.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Effie D. Botts, . .
Deputy. [90]

In the United States District Court, District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate et al., Defendants. No. E-4 (Tucson). Order Extending Time to File Record.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——, to File Record Thereof and to Docket Case. Filed Jun. 23, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States in and for
the District of Arizona.*

IN EQUITY—E-4. (Tucson.)

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and U. LAWRENCE
JONES,

Defendants.

**Order Extending Time to [September 4, 1915 to]
File Record and Docket Appeal.**

Upon reading the motion of Arizona Copper Estate, a corporation, praying that an order be entered granting it further time in which to file the record and docket the case in the Circuit Court of Appeals of San Francisco, California, under the order of appeal allowed on May 10th, 1915, and for good cause shown, and there being no objection thereto;

IT IS HEREBY ORDERED that the time within which said defendant, Arizona Copper Estate, shall be required to file the record in the above-entitled case and docket the case with the Clerk of the Circuit Court of Appeals of San Francisco, California, be and the same is hereby enlarged and extended to the fourth day of September, 1915.

Dated this 30th day of August, A. D. 1915.

WM. H. SAWTELLE,

Judge.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and W. Lawrence Jones, Defendants. In Equity—E-4 (Tucson).

Order Extending the Time to File Record and Docket on Appeal. Filed Aug. 30th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. Ben. C. Hill, Attorney at Law, Tucson, Arizona. [91]

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the above and foregoing to be a true, perfect and complete copy of an order extending the time of the Arizona Copper Estate to file record and docket on appeal in the case of Cornelius C. Watts et al., vs. Arizona Copper Estate et al., No. E-4 (Tucson), as the same appears from the original order on file and of record in my office at Tucson, Arizona.

WITNESS my hand and the seal of said Court affixed hereto at Prescott, Arizona, this 30th day of August, A. D. 1915.

[Seal]

GEORGE W. LEWIS,
Clerk.

By Effie D. Botts,
Deputy. [91½]

In the United States District Court, District of Arizona. No. E-4. Tucson. Cornelius C. Watts

and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, Defendants. Certified Copy of Order Extending Time.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to ——, to File Record Thereof and to Docket Case. Filed Sep. 2, 1915. F. D. Monckton, Clerk.

*In the District Court of the United States for the
District of Arizona.*

In Equity—E-4.—Tucson.

CORNELIUS C. WATTS and DABNEY C. T.
DAVIS, Jr.,

Plaintiffs,

vs.

ARIZONA COPPER ESTATE, U. LAWRENCE
BOYCE, W. TRUXTON BOYCE, URIEL
WRIGHT BOYCE, and U. LAWRENCE
JONES,

Defendants.

**Order Extending Time to [September 18, 1915, to]
File Record and Docket Appeal.**

Upon reading the motion of Arizona Copper Estate, a corporation, praying that an order be entered granting it further time in which to file the record and docket the appeal in the Circuit Court of Appeals at San Francisco, California, under the order of ap-

peal allowed on May 10th, 1915, and the various orders heretofore made extending the time therefor to September 4th, 1915, and for good cause shown, and there being no objections thereto:

IT IS HEREBY ORDERED that the time within which the said defendant, Arizona Copper Estate, shall be required to file the record in the above-entitled case and docket the appeal therein with the Clerk of the Circuit Court of Appeals at San Francisco, California, be and the same is hereby extended to the 18th day of September, 1915.

Dated this 14th day of September, 1915.

WM. H. SAWTELLE,
Judge.

[Endorsements]: In the District Court of the United States for the District of Arizona, Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, Defendants. In Equity E-4 (Tucson). Order Extending Time to File Record and Docket Appeal. Filed September 14th, 1915. George W. Lewis, Clerk. By Effie D. Botts, Deputy. [92]

United States of America,
District of Arizona,—ss.

I, George W. Lewis, Clerk of the United States District Court for the District of Arizona, do hereby certify the foregoing to be a true, perfect and complete copy of the order extending the time to file record and docket appeal in the case of Cornelius C. Watts et al., plaintiffs, vs. Arizona Copper Estate et al., defendants, made on the 14th day of Septem-

ber, A. D. 1915, as the same appears from the original on file and record in the clerk's office at Tucson, Arizona.

WITNESS my hand and the seal of said court affixed hereto at Prescott, this 14th day of September, A. D., 1915.

[Seal]

GEORGE W. LEWIS,

Clerk.

By Effie D. Botts,

Deputy. [92½]

In the District Court of the United States, for the District of Arizona. Cornelius C. Watts and Dabney C. T. Davis, Jr., Plaintiffs, vs. Arizona Copper Estate, U. Lawrence Boyce, W. Truxton Boyce, Uriel Wright Boyce and U. Lawrence Jones, Defendants. In Equity E-4 Tucson. Certified Copy of Order Extending Time to File Record and Docket Appeal.

[Endorsed]: No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. Certified Copy of Order Under Rule 16 Enlarging time to Sept. 18, 1915, to File Record Thereof and to Docket Case. Filed Sep. 6, 1915. F. D. Monckton, Clerk.

[Endorsed]: No. 2663. United States Circuit Court of Appeals, for the Ninth Circuit. Certified Copy of Orders Under Rule 16 Enlarging Time to Sept. 18, 1915, to File Record Thereof and to Docket Case. Refiled Sep. 27, 1915. F. D. Monckton, Clerk. [93]

[Endorsed]: No. 2663. United States Circuit Court of Appeals for the Ninth Circuit. Arizona Copper Estate, a Corporation, Appellant, vs. Cornelius C. Watts and Dabney C. T. Davis, Jr., Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Arizona.

Filed September 27, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

ARIZONA COPPER ESTATE,

Appellant,

against

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,

Appellees.

Brief for Appellant.

J. N. GILLETT,

F. A. CUTLER,

BEN C. HILL,

G. H. BREVILLIER,

Counsel for Appellant.

Filed

JAN 24 1916

F. D. Monckton,

Clerk.

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United States Circuit Court of Appeals

For the Ninth District.

Arizona Copper Estate,	}	No. 2663.
Appellant,		
against		
Cornelius C. Watts and Dabney C. T. Davis, Jr.,		
Appellees.		

BRIEF FOR APPELLANT

Statement of the Case

This case turns on the legal effect of an instrument in the conventional mortgage form, executed by the appellant to Messrs. Mathews and Syme (P. R. 77 to 80), simultaneously with their deed to it (P. R. 72 to 75).

The appellant contends that the instrument in question is the ordinary purchase money mortgage and created only a lien. The appellees contend, and the Court below held, that it should be construed with the deed to constitute a conditional sale, under which the appellant acquired no title to the property, because of the default in payment at maturity of the notes mentioned in the instrument.

The appellees brought this action to quiet title and not to reform any instrument (P. R. 31). There is no allegation nor finding herein of mistake or fraud in the transaction, nor of any agreement contrary to the executed instruments; and the decree is based upon the instruments as executed. The

Court below permitted the appellees to introduce testimony to prove the intended or expected legal effect of the deed and purchase money mortgage, but ignored such testimony in the findings.

The Arizona Copper Estate was duly incorporated under the laws of Arizona (P. R. 57, 58). The appellees have abandoned their allegations as to the non-incorporation of the appellant corporation.

On August 3, 1899, Messrs. Alex. F. Mathews and S. A. M. Syme purported to convey to The Arizona Copper Estate, the appellant, a tract of Arizona land known as Baca Float No. 3, containing about 99,000 acres of land (P. R. 72 to 74), representing that they had a good title (P. R. 81). At the time of the conveyance, the grantors had one of four conflicting chains of title to the Float; and there had been two locations of it, neither of which was then recognized by the United States.

On the same date and in the same transaction, The Arizona Copper Estate mortgaged the same premises to Messrs. Mathews and Syme, to secure \$100,000 in notes executed by it to various parties, including the mortgagees. This instrument was prepared by Captain Mathews (an experienced lawyer, banker and real estate operator and one of the mortgagees) on a *printed mortgage form* (P. R. 40 to 42), marked "*Mortgage without Bond*" at the top and "*Mortgage*" on the cover.

The mortgage was completed in the customary way; and for the sake of clearness, the appurtenance and *habendum* clauses were repeated after the description. The instrument bears the war stamps of a mortgage and it was promptly recorded as a mortgage. In the year 1901, Capt. Mathews and C. H. Syme (the son of the other mortgagee and also a lawyer) referred to it as a mortgage (P. R. 58, 59).

Capt. Mathews read over the mortgage after it was executed (P. R. 43), and then turned it over to Col. Syme for record-

ing. Subsequently it alternated in the possession of the mortgagees until 1906, when it was turned over to the appellees (P. R. 42, 43).

Shortly prior to August, 1899, Senator Dorsey of the Copper Estate had an option or contract of sale from Col. Syme, which the latter rescinded or repudiated for reasons which he alone understands (P. R. 41). In August, 1899, Col. Syme wished to give another option (P. R. 32); but Senator Dorsey of the Copper Estate, after his experience with the former option, "wanted a deed" (P. R. 32).

In the transaction of August 3, 1899, \$5,000 cash was paid (P. R. 41); and this Col. Syme divided among Capt. Mathews, Col. Boyce (the broker) and himself (P. R. 77 to 81). The notes specified in the mortgage were distributed among Capt. Mathews as Trustee for Miss Eldredge, Capt. Mathews personally, Col. Boyce and Col. Syme (P. R. 43, 44).

By a decision dated July 25, 1899, and reported in 29 L. D. 44, the Secretary of the Interior changed the location of the Float; and on August 3, 1899, this was known to Messrs. Mathews and Syme, but apparently not to Senator Dorsey who acted for the Copper Estate (P. R. 41, 83). Capt. Mathews and Mr. C. H. Syme admitted in 1901 that the default in the notes was "largely occasioned" by that decision (P. R. 59).

Shortly after the transaction of August 3, 1899, Senator Dorsey of the Copper Estate went to Washington to investigate the condition of the title to the Float. After consulting fully with the attorneys of the Land Department, he found that the title was so complicated that nothing could be done with it in a commercial way (P. R. 83).

Between 1899 and 1906, nothing was done by Messrs. Mathews and Syme except to turn over the papers to one or two sets of lawyers (P. R. 43 to 48), and to petition the Sec-

retary of the Interior to reverse the decision of July 25, 1899 (P. R. 58, 59).

In 1906, after the mortgage and notes were barred by the Arizona statutes of limitation, the appellees, Messrs. Watts and Davis, both lawyers, came into the situation as attorneys for Mathews and Syme. In 1907, after the death of Captain Mathews, Colonel Syme and the legal representatives of Captain Mathews executed a trust instrument purporting to transfer the property to Messrs. Watts and Davis as Trustees, with power to sell, convey, lease, mortgage or dispose of it (P. R. 67 to 71). This instrument was not recorded until March 20, 1914. Messrs. Watts and Davis represent Col. Syme and the Mathews Estate and have ever since 1907 (P. R. 45, 60).

On June 22, 1914, the United States Supreme Court decided that the legal title to the specific tract of land now known as Baca Float No. 3, located in 1863 with specific boundaries, passed from the United States on April 9, 1864, over fifty years prior to the decision (*Lane v. Watts*, 234 U. S. 525; 235 U. S. 17). In that action, attorneys representing two diverse titles from the Baca heirs joined as attorneys for the successful parties; and the deed and purchase money mortgage herein appear on page 337 of the record in that case. In that record may be found also the chain of title of the appellees herein, and still another absolutely adverse chain. None of the questions herein was involved or passed upon in that case.

On June 23, 1914, the day following the announcement of the decision by the United States Supreme Court, Messrs. Watts and Davis filed their Bill herein. Shortly prior to the filing of the Bill, the appellees had quietly taken actual possession of the tract (P. R. 51), although there was no technical right of possession against the United States until the filing of the plat of survey on December 14, 1914 (P. R. 49),

notwithstanding the passage of full legal title in 1864 (*Lane v. Watts*, 235 U. S. 17).

The Bill prayed that the transaction of August 3, 1899, be treated as a nullity, for the reason that the Copper Estate was supposedly never incorporated, or in any event because the deed and purchase money mortgage were said to constitute a conditional sale in which the title automatically and absolutely reverted to Messrs. Mathews and Syme on the non-payment of the notes. The Bill is also susceptible of being treated as one for the foreclosure of a mortgage (Bill, Sections 11, 29). There were two amendments to the Bill presenting other legal theories of the transaction.

The Copper Estate in its amended answer contended that the transaction of August 3, 1899, was the ordinary deed and purchase money mortgage transaction and pleaded the Arizona statutes of limitation against the notes and the mortgage, as well as against all relief prayed for by the plaintiffs.

Subsequent to the commencement of the action, the Copper Estate conveyed its title to a third party and the deed was promptly recorded. This was set up in its amended answer and was stated by counsel at the trial. With the permission of the Copper Estate (P. R. 36, 37, 95, 96), both express and implied, the action was defended by the third party in its name, in accordance with the well recognized rule that one who *pendente lite* acquires the title of a *defendant* in a real estate action may defend and appeal in the name of his grantor (*Ex Parte R. R. Co.*, 95 U. S. 221, 226; *Ecaubert v. Appleton*, 67 Fed. 917, 923; *Hickox v. Elliott*, 22 Fed. 13, 18).

We offered to have the grantee and her *cestui que trustent* (who also claims under another chain of title) added as parties defendant; but the appellees objected, although they had at one time considered the advisability of making the grantee of the Copper Estate a party defendant (P. R. 54 to 57).

No part of the note indebtedness was ever paid; no suit was ever brought to foreclose the mortgage or to collect the notes (P. R. 47, 61). There was no foreclosure under any assumed power of sale (P. R. 47, 61).

It was stipulated that no question of community property is involved (P. R. 47). Messrs. Mathews and Syme resided, and were born and married, in jurisdictions where the dower system has always been in force (P. R. 28, 29); consequently, under all the authorities, their respective wives had no community rights in the property.

At the trial herein, the appellees, against the objection and exception of the appellant, introduced the testimony of Col. Syme (who was then seventy-seven years of age) as to the understanding of the parties, sixteen years prior thereto, of the legal consequences of a default in the notes mentioned in the purchase money mortgage. That testimony need not be repeated here, as it was simply an inexperienced layman's conception of how a purchase money mortgagee gets back his title. Col. Syme frankly said that he did not know the difference between a deed and a mortgage; and that, according to his understanding, the mortgage expresses the agreement, as it states (in the defeasance clause) that if the notes are not paid, the property shall revert to Capt. Mathews and himself (P. R. 48).

Col. Syme considered the mortgage to be a deed of reconveyance (P. R. 47) and the whole transaction only an option. The witness admitted that the Copper Estate insisted upon receiving a deed, while the grantors at first wished to give only an option (P. R. 32).

The appellees also introduced, without objection, a statement obtained by Mr. Davis from Senator Dorsey as to his "best recollection" in 1914, shortly before the commencement of this suit and the announcement of the decision of the United States Supreme Court in the *Baca Float* case (P. R.

81 to 83). The repetition in the statement of the defeasance clause of the mortgage shows actually a purchase money mortgage transaction, and the statement as a whole clearly indicates such a transaction and not a conditional sale. His "understanding" of the legal effect of the papers, although vague and confused, is simply an erroneous conclusion of law and immaterial. His "understanding" at that time that the Copper Estate had no title was premised entirely on his assumption that it was never incorporated; the appellees' testimony (P. R. 49 to 51) and the charter of the corporation (P. R. 57, 58) prove the contrary and destroy his premise. His reference to the lack of "indebtedness" is explained by his succeeding sentence, that the Copper Estate was incorporated especially for the transaction and was expected to have no other assets.

Conclusive evidence that the disputed instrument was intended to be a mortgage is shown in the preparation of it in the presence of all of the parties by Capt. Mathews, the only lawyer among them, on an ordinary printed mortgage blank, which was headed and backed as a "Mortgage," in the stamping of it as a mortgage and in its record as such; and especially in the instrument itself, with its defeasance clause, its covenant to pay the note indebtedness and the provision for a foreclosure sale on default.

Absolute proof that the mortgagees knew that they had received only a mortgage is found in a formal declaration in 1901 of two lawyers—Capt. Mathews, one of the mortgagees, who drew the papers, and C. H. Syme, the son of the other mortgagee and the attorney for both of them (P. R. 58 to 60).

The lower Court delivered no opinion, but signed a combination of findings and decree to the effect that the deed and the purchase money mortgage are to be construed as one in-

strument and constitute a conditional sale of the land, by which the appellant neither acquired nor has any right, title, interest or estate because of the default in the payment of the notes. The affirmance of the doctrine of the decree will cloud innumerable titles throughout the jurisdiction of this Court.

We contend that under the uniform decisions of the courts in the Western states, and under the Arizona statute which was adopted *verbatim* from California, the mortgage was only a lien and passed no title, before or after default. We also contend that the mortgage and the notes secured thereby are now barred by the Arizona statutes of limitation.

Assignments of Error

FIRST: The Court below erred in finding and decreeing that the deed of conveyance from Alexander F. Mathews and Samuel A. M. Syme to Arizona Copper Estate and the instrument of reconveyance executed by Arizona Copper Estate to said Mathews and Syme, recorded in the Recorder's office of Pima County, Arizona, in Book 15 of Mortgages, page 60, and hereinafter referred to as the "reconveyance," are to be construed as one instrument and constitute a conditional sale of the land referred to therein.

SECOND: The Court below erred in not finding and decreeing that said reconveyance was a mortgage.

THIRD: The Court below erred in admitting and considering any testimony or evidence as to the meaning, construction or contemplated legal effect of the said reconveyance, or the intention of the parties with reference to said reconveyance or the \$100,000 of notes recited therein.

FOURTH: The Court below erred in admitting and considering the testimony of Samuel A. M. Syme to the effect

that it was the understanding and intention of the parties to said reconveyance that in case the \$100,000 of notes recited therein were not paid according to their tenor and effect, the land described in said reconveyance should be the property of the grantees therein; that the sale was not to be deemed made unless and until said notes and all of them were paid, and that in case said notes were not paid they, as well as said deed and reconveyance, were to be void.

FIFTH: The Court below erred in finding and decreeing that said Arizona Copper Estate acquired no interest or estate in the land described in the decree under said deed and reconveyance, and that they constitute a cloud on plaintiff's title.

SIXTH: The Court below erred in finding and decreeing that the full legal title to said land was in the appellees, and barring the appellant and its successors in interest from asserting any interest or title under said deed and reconveyance.

SEVENTH: The Court below erred in not finding and decreeing that said reconveyance and the notes recited therein were barred by the Arizona Statutes of Limitation.

EIGHTH: The Court below erred in not finding and decreeing that all relief of the plaintiffs was barred by the Arizona Statutes of Limitation.

NINTH: The Court below erred in not dismissing the bill on the merits.

Brief of Argument

POINTS

I. The instrument from the Arizona Copper Estate to Mathews and Syme is an ordinary real estate mortgage.

II. The mortgage created only a lien for a purchase money debt and did not operate as a conveyance or conditional sale.

III. Parol evidence was not admissible to show the intended or expected legal effect of the mortgage and cannot be considered by the Court, even if received without objection.

IV. There is neither allegation, proof nor finding of mistake.

V. Analysis of evidence.

VI. All relief to plaintiffs is barred by limitations and laches.

VII. There was no power of extra-judicial sale nor any attempt to exercise such a power.

VIII. Neither Mrs. Mathews nor Mrs. Syme had community rights.

IX. The appellant was properly incorporated and its corporate existence cannot be attacked by the appellees.

I

The instrument from the Arizona Copper Estate to Mathews and Syme is an ordinary real estate mortgage.

Form and Preparation of Paper

The instrument at bar, prepared and executed in New York City on a *New York printed mortgage blank*, followed the New York statutory form of mortgage (*New York L. 1890 ch. 475, Sec. 6; Sec. 223 of Real Property Law of 1896*). A form of "Mortgage without bond" was used because a number of negotiable notes, of varying amounts and maturities, were intended to be secured, instead of the customary single bond. A printed form was desired which would not require radical changes in form or arrangement.

The instrument in question was prepared in the presence of all the parties by Capt. Mathews, a lawyer, banker and real estate operator and one of the mortgagees therein (P. R. 33, 37, 40, 41, 42). It was completed on a printed mortgage blank, marked "Mortgage without Bond" at the top and "Mortgage" on the cover. The heading and endorsement notified the parties that filling it out would produce a mortgage.

The instrument was recorded by the mortgagees as a mortgage and no objection made by them to its record as such. Afterwards, and before it became barred by the statute of limitations, it was called a mortgage by Capt. Mathews and by Mr. C. H. Syme, also a lawyer and the son of the other mortgagees therein (P. R. 58 to 60).

The instrument recites a fixed debt, promises to pay it, provides for defeasance on payment, and for a foreclosure sale on default. If that does not constitute a mortgage, what would?

Revenue Stamps

On the deed to the Copper Estate (P. R. 72 to 74), war revenue stamps to the amount of \$125 were affixed. This was based on a value or consideration of \$125,000 (30 Stat. L. 461, 462), being the amount of the contract price in the prior negotiations (P. R. 41). The purchase money mortgage, however, has only \$46.50 in revenue stamps. If the mortgage had been intended as a sale or reconveyance, the sum of \$100 in war stamps would have been affixed, because of the \$100,000 in notes, instead of \$46.50 in stamps, which is a very close approximate to the amount required on a mortgage (30 Stat. L. 460). No stamps were affixed to the notes because of the stamps on the mortgage (30 Stat. L. 1390). If the notes had not been secured by a mortgage, Capt. Mathews as a lawyer and bank president would also have affixed the proper stamps on the notes (30 Stat. L. 459).

From the stamping alone, it is quite evident that the parties treated the purchase money mortgage as a mortgage, and not as a reconveyance which required \$100 in war stamps thereon and an additional \$20 in stamps on the notes.

Defeasance Clause

The mortgage has the usual form of defeasance clause and that is the plainest indication that a mortgage was meant (27 Cyc. 1083).

The defeasance clause alone makes the instrument a mortgage.

27 Cyc. 996.

Scott v. Hughes, 53 S. E. 453; 124 Ga. 1000.

The use of a printed blank containing a defeasance clause, even though that clause was not filled out, has been held sufficient to make a mortgage (*Burnett v. Wright*, 135 N. Y. 543).

Cases are readily found wherein even an informal defeasance clause has been held sufficient in itself to constitute a mortgage:

Teal v. Walker, 111 U. S. 242.

Eckford v. Berry, 87 Tex. 415; 28 S. W. 937.

Land v. May, 73 Ark. 415; 84 S. W. 489.

Poston v. Jones, 122 N. C. 536; 29 S. E. 951.

National Bank v. Tenn. Co., 62 Ohio 564; 57 N. E. 450.

Johnson v. Prosperity Ass'n, 94 Ill. App. 260, 264, 267, 268.

Whenever an instrument of conveyance states that the payment of a sum of money will defeat it, it is simply a mortgage, both in form and effect (27 Cyc. 996).

Existence of Debt

The negotiable promissory notes issued by the Copper Estate and aggregating \$100,000 are certainly evidence of a continuing debt. The absence of such a debt would not convert the mortgage into a sale (*Russell v. Southard*, 12 How. 139, 152), but the existence of a debt is necessary to convert an apparent sale into a mortgage (*Conway v. Alexander*, 7 Cranch, 218, 237).

The mortgage recites the execution of the notes of the Copper Estate and contains an express covenant by it to "pay the *indebtedness* as hereinbefore provided." The disputed instrument was given to protect or secure the indebtedness represented by these notes. It is, therefore, nothing but a mortgage, irrespective of the understanding of the parties or some of them as to its legal effect.

Foreclosure Clause

The mortgage further states that if default be made in the payment of any part of the indebtedness, the mortgagees "shall have power to sell the premises herein described according to law." This is their only right or remedy *in rem*: *expressio unius est exclusio alterius*.

That power to sell "according to law" can be exercised only by a foreclosure sale; and, as Arizona had no statute detailing the method of a non-judicial foreclosure sale, the sale could be had only under a court decree in a foreclosure action.

Copper Belle Mining Co. v. Costello, 12 Ariz. 318, 325; 100 Pac. 807.

Brickell v. Batchelder, 62 Cal. 623, 629, 630.

Cormorais v. Genella, 22 Cal. 116, 124.

Shillaber v. Robinson, 97 U. S. 68, 69, 77, 78.

Grant v. Phoenix Life Insurance Co., 121 U. S. 105, 112.

Lariverre v. Rains, 112 Mich. 276, 282; 70 N. W. 583.

Condon v. Maynard, 71 Md. 601, 605; 18 Atl. 957.

In 1899, the Arizona statute contemplated that the parties would supply in detail the provisions for any contemplated non-judicial foreclosure sale (R. S. Ariz. 1887, Sec. 2359).

The provision for a foreclosure sale determines the instrument to be only a mortgage and negatives any revesting of title in the mortgagees except through such a sale.

Distinction Between Mortgage and Conditional Sale

If an absolute conveyance is given as *security* for an indebtedness, the instrument is a mortgage. In case the absolute conveyance is given in *actual payment* of an indebtedness, but with a reserved option of repurchase, then it is a sale.

When a conveyance, not intended as security or as a separate defeasance, is declared to be *operative* upon the optional payment of money, then it is executory in effect and in form a conditional sale. If a conveyance is *defeasible* or can be rendered void by the payment of money, it is a mortgage, even if the mortgagor be not personally bound therefor.

Any doubt as to whether a transaction constitutes a mortgage is always resolved in favor of its being a mortgage (*Russell v. Southard*, 12 How. 139, 151).

In the cases bringing out the distinctions between mortgages and conditional sales, the instrument is in form an absolute conveyance, with no mention of a debt, but giving an option to repurchase.

In the case at bar, there is not only a recited and continuing indebtedness, evidenced by negotiable promissory notes, but the instrument contains an express promise to pay it, provides for a *defeasance* on payment and a foreclosure on default. By all the tests, this makes the paper a mortgage (27 Cyc. 968).

Admissions by Mathews and Syme

In 1901, Alex. F. Matthews, one of the mortgagees, and C. H. Syme, son of the other mortgagee and attorney for both of them, presented a petition to the Interior Department (P. R. 58 to 60) stating in effect that the property had been sold to the Copper Estate and notes received for the purchase price, *secured by a mortgage*. The identity of the transaction is not denied. C. H. Syme attended the trial herein, but was not called to explain the statements.

As the best qualified parties called the paper a mortgage, their admission is of great importance (*Adams v. Hopkins*, 144 Cal. 19, 33; 77 Pac. 712); and "the doctrine of 'once a mortgage, always a mortgage,' applies to it" (*Dean v. Nelson*, 10 Wall. 158, 171).

The admission by the mortgagees in the course of ownership is admissible against the plaintiffs, their successors in title, especially as the plaintiffs are concededly in part at least trustees for the mortgagees (P. R. 45).

Baker v. Humphrey, 101 U. S. 494, 499.

Gaines v. Relf, 12 How. 472, 531.

Rush v. French, 1 Ariz. 99, 143; 25 Pac. 816.

Costello v. Graham, 9 Ariz. 257, 263; 80 Pac. 336.

16 Cyc. 986 B.

II

The mortgage created only a lien for a purchase money debt and did not operate as a conveyance or conditional sale.

Arizona Statute

In 1899, there was an Arizona statute to that effect:

“A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale” (R. S. Ariz. 1887, Sec. 3155; see also Sec. 797).

Construction of Similar Statutes

The *identical statute* in California, Montana, Utah and Nevada, and similar statutes in Oregon, Washington, and Michigan, have been held to make every mortgage (*including a purchase money mortgage to the vendor*) a mere lien, leaving legal title and full right of possession in the mortgagor until after a foreclosure sale.

Neslin v. Wells, 104 U. S. 428, 430, 440 (purchase money mortgage).

Teal v. Walker, 111 U. S. 242, 251.

Savings Society v. Multnomah County, 160 U. S. 421, 426.

Bilger v. Nunan, 199 Fed. 549 (decided by this Court).

Couper v. Shirley, 75 Fed. 168, 170 (decided by this Court).

Union M. L. I. Co. v. Union M. P. Co., 37 Fed. 286, 291 (purchase money mortgage).

Adams v. Hopkins, 144 Cal. 19, 32; 77 Pac. 712 (purchase money mortgage).

Castro v. Adams, 153 Cal. 382; 95 Pac., 1027 (purchase money mortgage).

Kidd v. Teeple, 22 Cal. 255, 256, 262 (purchase money mortgage).

Bludworth v. Lake, 33 Cal. 255, 261, 264 (purchase money mortgage).

McMillan v. Richards, 9 Cal. 365, 410.

Nagle v. Macy, 9 Cal. 426, 428.

Reading v. Waterman, 46 Mich. 107 (purchase money mortgage).

Norfor v. Busby, 19 Wash. 540; 53 Pac. 661.

First Nat'l Bank v. Mining Co., 8 Mont. 32; 19 Pac. 403.

Orr v. Ulyatt, 23 Nev. 134; 43 Pac. 916.

Sidney Co. v. South Ogden Co., 20 Utah 267; 58 Pac. 843.

Arizona Adopted California Statute and Decisions

The Arizona statute was adopted *verbatim* from section 260 of the California Practice Act of 1851 (now section 744 of the California Code of Civil Procedure of 1906). All of the above statutes were adopted from or based upon the California statute.

Prior to the adoption by Arizona in 1887 of the California statute, the Supreme Court of California and the United States Supreme Court had decided that a mortgagor thereunder held the full legal title until foreclosure sale. In the cases of *Neslin v. Wells* (104 U. S. 428, 430, 440), *Kidd v. Teeple* (22 Cal. 255, 256, 262) and *Bludworth v. Lake* (33 Cal. 255, 261, 264) *that construction of the statute had been applied to purchase money mortgages to the original vendor.*

The construction of the statute by the California courts and by the United States Supreme Court was necessarily adopted by Arizona, as its Supreme Court has frequently decided that

when Arizona enacts a statute of another state, the prior construction of that statute by the highest court of such sister state is not only controlling on the Arizona courts but is a part of the Arizona statute.

Murphy v. Brown, 12 Ariz. 268, 276; 100 Pac. 801.

Territory v. Copper Queen Co., 13 Ariz. 198, 215;
108 Pac. 960.

Territory v. Delinquent Tax List, 3 Ariz. 117; 21 Pac. 768.

Chedq v. Skinner, 6 Ariz. 196; 57 Pac. 64.

Goldman v. Sotelo, 8 Ariz. 85; 68 Pac. 558.

Elias v. Territory, 9 Ariz. 1; 71 Pac., 605.

Santa Cruz County v. Barnes, 9 Ariz. 42; 76 Pac. 621.

Costello v. Mulheim, 9 Ariz. 422; 84 Pac. 906.

Contractual Effect of Statute

The Arizona statute was also a contractual part of the mortgage (*Hooker v. Burr*, 194 U. S. 415, 420), as a mortgage is construed and given effect according to the laws of the State where the land is situated (*Brine v. Ins. Co.*, 96 U. S. 627, 636; *Hendey v. Townsend*, 109 U. S. 665; 20 Cyc. 975).

Arizona Lien Theory Decisions

The lien theory of a mortgage is followed in Arizona. Its Supreme Court has held that a mortgagor retains legal title. It has also repeatedly applied the limitation statutes to mortgage foreclosures when the debt was barred.

Bennett v. U. S. Land Co., 16 Ariz. 138, 144, 145;
141 Pac. 717.

Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.

Provident Ass'n v. Schwertner, 15 Ariz. 517, 518; 140
Pac. 495.

Schwertner v. Provident Ass'n, 17 Ariz. unreported;
148 Pac. 910.

In the Holmes case, at page 301, the Supreme Court of Arizona said that a trustee under a resulting trust for a purchaser of the mortgaged premises, long after default in the debt, had the naked *legal title* to the land; in that case it was only the naked title because of the trust between the trustee and the purchaser.

General Authorities for Lien Theory

Even independent of any statute, the rule in all of the States west of the Mississippi River (except to a limited extent in Arkansas), and in a great majority of the other States, is that every mortgage (including a purchase money mortgage), both before and after default, is a mere lien or security, passing no title or estate to the mortgagee, and giving him no right or claim to the possession of the property, except through an actual foreclosure sale. That is the "modern common law doctrine and the one generally accepted in this country."

I Jones on Mortgage (6th Ed.), Sec. 59.

Stearns Rogers Co. v. Aztec Co., 14 N. M. 300, 308 to end; 93 Pac. 706, 712 to 714.

27 Cyc. 961 to 963.

1913 Cyc. Ann. 2394.

Myer v. Car Co., 102 U. S. 1, 10.

Cross v. Allen, 141 U. S. 528, 537.

Jackson v. Johnson, 248 Mo. 680, 684, 698, 702; 154 S. W. 759.

U. S. v. Commonwealth Trust Co., 193 U. S. 651, 655, 656.

It was and is also the Civil Law of Spain and Mexico.

Coles v. Perry, 7 Tex. 109.

Royal Ins. Co. v. Miller, 199 U. S. 353, 361.

Trust Deeds

“A deed of trust of real estate, executed for the purpose of securing a debt, conditioned to be void upon payment of the debt, and containing a power of sale on default, is essentially a mortgage, and does not differ in its legal operation and effect, from an ordinary mortgage with power of sale. Like a mortgage, such a deed is a mere security for a debt, or for the performance of certain undertakings by the grantor. It is a mere incident to the debt which it secures, upon which it depends, and which it follows, and will pass with an assignment of the debt to the holder.”

27 Cyc. 967.

Stearns Rogers Co. v. Aztec Co., 14 N. M. 300, 328;

93 Pac. 706, 712.

Platt v. Union Pac. R. R. Co., 99 U. S. 48, 57.

Sidney Co. v. South Ogden Co., 58 Pac. 843; 20

Utah 267, under statute identical with R. S.

Ariz. 1887, Sec. 3155.

Messrs. Mathews and Syme were both declared to be creditors in the mortgage. As no one can be a trustee for himself, the transaction is an ordinary mortgage, as the trustees owned part of the debt secured by the instrument.

28 A. & E. Ency. Law (2nd Ed.) 764.

2 Jones on Mortgages, 730, 731.

Banta v. Wise, 135 Cal. 277, 280; 67 Pac. 129, 130.

A trust deed in the nature of a mortgage is one that is given as security for a debt; a deed of trust for the benefit of creditors generally or other beneficiaries is governed by the local rules as to express trusts.

Effect of Purchase Money Mortgage

Even though the instrument to Messrs. Mathews and Syme was given simultaneously with the deed for all or most of the purchase money, it is not a conditional sale, but a simple mortgage, passing no title to the mortgagee.

Adams v. Hopkins, 144 Cal. 19, 32; 77 Pac. 712, 717.

Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.

Bludworth v. Lake, 33 Cal. 255, 261, 264.

Kidd v. Teeple, 22 Cal. 255.

Ferguson v. Miller, 4 Cal. 97.

Dean v. Nelson, 10 Wall. 158, 171.

Anderson v. Baxter, 4 Ore. 105, 108, 110.

Becker v. McCrea, 193 N. Y. 423; 86 N. E. 1122.

Barson v. Mulligan, 191 N. Y. 306; 84 N. E. 75.

Stearns Rogers Co. v. Aztec Co. 14 N. M. 300, 312, 326 to end; 93 Pac. 706.

Jackson v. Johnson, 248 Mo. 680, 684, 698, 702; 154 S. W., 759.

R. S. Ariz. 1887 Sec. 3155 (quoted in full *supra*).

The Arizona statute above cited is absolutely decisive that "a mortgage of real property, whatever its terms, shall not be deemed a conveyance." This necessarily includes a purchase money mortgage; and, as before stated, the California Courts and the United States Supreme Court so construed such a statute both before and after its adoption by Arizona.

Right of Possession

Neither the mortgagees nor their assigns had any right to take possession of the land until after foreclosure sale; even if the mortgagees did take possession before foreclosure sale, they are in no better position than if out of possession.

R. S. Ariz. 1887, Sec. 3155 (quoted in full *supra*).

Teal v. Walker, 111 U. S. 242, 251.

Russell v. Ely, 2 Black (U. S.) 575.

Couper v. Shirley, 75 Fed. 168, 170 (decided by this court).

Anderson v. Baxter, 4 Ore. 105.

Nagle v. Macy, 9 Cal. 426, 428.

Ferguson v. Miller, 4 Cal. 97.

Kidd v. Teeple, 22 Cal. 255, 262.

Barson v. Mulligan, 191 N. Y. 306, 313, 314, 316; 84 N. E. 75.

Becker v. McCrea, 193 N. Y. 423, 426, 427; 86 N. E. 1122.

Construing Papers Together

For some purposes, a deed and an accompanying purchase money mortgage are said to be indivisible and are construed together. This is done to cut off intervening liens or estates, to describe the property, or to protect the grantor against an incompetent mortgagor; but not to change the legal effect of either paper.

In the famous case of *Adams v. Hopkins* (144 Cal. 19, 32, 33; 77 Pac. 712, 717), followed and approved in *Castro v. Adams*, (153 Cal. 382; 95 Pac. 1027), where an unsuccessful attempt was made to treat a deed and concurrent purchase money mortgage as a conditional sale, the California Supreme Court, sitting *en banc*, said:

“The two documents (deed and purchase money mortgage) are, indeed, to be construed together as one contract. But this does not alter the manifest effect of either; and, though the words of conveyance be the same in both documents, yet in the one they are to be construed as passing title, in the other as merely mortgaging the land.”

The deed and mortgage are not to be “joined together”;

neither loses its separate identity or legal effect (see *Bank v. Flath*, 86 N. W. 867; 10 N. D. 281).

Improbability of Conditional Sale

What was the purpose of the simultaneous deed to the Copper Estate (P. R. 72 to 74), if it was not to convey to it the legal title, and then take back a purchase money mortgage? If the parties had intended a conditional sale, Capt. Mathews would have prepared the executory contract of sale which he originally wished to give (P. R. 32), instead of a deed, notes and a purchase money mortgage.

Nevertheless, the appellees ask this Court to rule that a conditional sale was consummated by the Copper Estate, first acting in form as absolute grantee and then as conditional vendor, but in reality as conditional vendee; and by Mathews and Syme, first appearing in form as absolute grantors and then as conditional vendees, but in reality being only conditional vendors.

The Copper Estate refused to take another option (P. R. 32), after having already had one (P. R. 41); after its experience with Col. Syme in the option transaction, it is clear why Senator Dorsey "wanted a deed" (P. R. 32) and that no conditional sale was intended.

Analogous Cases

In *Dean v. Nelson*, 10 Wall. 158, 171, a purchase money mortgage was given to the vendor with an obligation, payable only out of profits, for the *entire purchase price* of property. It was contended that the instrument *according to its spirit* was a conditional sale, and that in view of the circumstances under which it was given, it would be a hardship to treat it as a mortgage; but the Court decided that it was nothing but a mortgage and said:

"Was it a conditional sale, or was it a mortgage?"

On this question hardly a doubt can be raised. The Court is asked by the appellant, under the circumstances of the case, which the appellant asserts to have been unconscionable on Nelson's part, to consider the instrument as a conditional conveyance of the stock, and not a mortgage. But the Court has no power over the transaction to make it other than, or different from, what the parties themselves made it. If it is a mortgage, it is the duty of the Court to declare it a mortgage; and if it is a mortgage it has, perforce, all the incidents and privileges of a mortgage; and that it is a mortgage there is no room for question."

In *Ferguson v. Miller*, 4 Cal. 97, a defeasible deed was given for the *entire purchase price*. The mortgagee after default took possession of the property, and the mortgagor abandoned it. Subsequently the property greatly increased in value and the mortgagor quitclaimed to a purchaser during the pendency of the action. An attempt was made to prove the transaction a conditional sale and the mortgagor gave testimony tending to sustain that contention. The lower Court held the transaction to be a conditional sale. Mr. Justice Field, then at the bar, argued for the respondent that the intention should govern; that Section 260 of the California Practice Act of 1851 (adopted later by Arizona as Sec. 3155 of its Code of 1887) did not apply because enacted after the transaction; that the words "mortgage" or "security" did not appear in the paper; and that there was no loan of money or security intended. The Appellate Court brusquely reversed the Court below, saying that the error "was too palpable for discussion"; and that the paper was so distinctly a mortgage that it could not be called by any other name. Shortly thereafter Mr. Justice Field, in two famous decisions (*McMillan v. Richards*, 9 Cal. 365; *Nagle v. Macy*, 9 Cal. 426), defi-

nately established in the Western states the lien theory of a mortgage under the California statute, as well as under the modern rules of law.

In *Adams v. Hopkins* (144 Cal. 19, 32; 77 Pac. 712, 717), a *conditional* obligation was given for the *entire purchase money* and the Court *en banc* held that the accompanying concurrent defeasible conveyance to the original vendor was an ordinary mortgage and not a conditional sale.

In *Castro v. Adams* (153 Cal. 382; 95 Pac. 1027), the last named case was followed and approved, even against the original mortgagee; and the plea of the statute of limitations was sustained for the entire purchase price of a Mexican Grant which at the time of the transaction had been in course of confirmation and for which a patent had only recently been issued.

In *Anderson v. Baxter*, 4 Ore. 105, a purchase money mortgagor had abandoned the property for a long time and had given no personal obligation with the mortgage; his grantee successfully pleaded the statute of limitations.

Becker v. McCrea (193 N. Y. 423; 86 N. E. 1122), and *Barson v. Mulligan* (191 N. Y. 306; 84 N. E. 75) are also interesting cases and show that purchase money mortgages are as to legal effect the same as other mortgages, notwithstanding any supposed harshness in applying the rule.

Appellees' Cases

In the Court below, counsel for the appellees relied chiefly on Texas cases to support their claim that the deed and purchase money mortgage constitute on their face a conditional sale.

Although in Texas a loan mortgage is only a lien or security, there is an extraordinary distinction recognized there in the case of purchase money mortgages, executed to the vendor simultaneously with the deed to the mortgagor. Fol-

lowing the leading Texas case of *Dunlap v. Wright*, 11 Texas, 597, the Texas courts, without question for many years, held that a deed and a simultaneous purchase money mortgage to the vendor constitute one instrument and leave the legal title in the mortgagee until payment.

In recent cases, however, the Texas courts seem to appreciate their isolation in maintaining that proposition and have questioned its soundness, so far as allowing the mortgagee to rescind the transaction; and

“the tendency of the late decisions seems to point to the ultimate abandonment of the rule in its full vigor, or at least to a modification thereof.”

McCamly v. Waterhouse, 80 Tex. 340, 342, 343; 16 S. W. 19.

Stitzle v. Evans, 74 Tex. 596, 598; 12 S. W. 326.

Ins. Co. v. Ricker, 10 Tex. C. A. 264, 266, 267; 31 S. W. 248 and cases cited.

This right of rescission in Texas is personal to the vendor (*Ins. Co. v. Ricker*, 10 Tex. C. A. 264, 267; 31 S. W. 248). A purchaser of vendor's lien or purchase money mortgage notes is not entitled to rescission but only to a decree of foreclosure; and part payment destroys the right of rescission.

Dupree v. Mansur, 214 U. S. 161, 166, decided with reference to a Texas transaction.

McCamly v. Waterhouse, 80 Tex. 340, 343; 16 S. W. 19.

Ins. Co. v. Ricker, 10 Tex. C. A., 264, 267; 31 S. W. 248.

In the case at bar nearly one-half of the notes secured by the mortgage were issued to others than the vendors, carrying therewith an equivalent interest in the security; and an adjustment in the notes was also made because of the distribu-

tion of the \$5,000 cash (P. R. 43). Furthermore, the appellees are the owners and holders by some transfer of three-quarters of the notes (P. R. 9, 60). They have not returned nor offered to return the \$5,000 paid for the deed—an indispensable prerequisite to any rescission. It is clear, therefore, that even in Texas, the appellees would not be entitled to the *rescission* which in effect they ask herein, with reference to a transaction of their predecessors in title.

The best explanation of the Texas rule is that it is the result of the extraordinary application and use in that state of the vendor's lien on realty for unpaid purchase money. *The doctrine of vendor's lien is not recognized at all in Arizona (Baker v. Fleming, 6 Ariz. 418; 59 Pac. 101); and the United States courts are bound by the Arizona rule (Dupree v. Mansur, 214 U. S. 161, 167; 39 Cyc. 1800).*

The early New York cases to the effect that a purchase money mortgage conveys the legal title have been overruled in New York for nearly a century (*Becker v. McCrea*, 193 N. Y. 423; 86 N. E. 1122; where it was held that the heirs of the original purchase money mortgagee who had taken possession did not have title even by adverse possession).

Counsel for the appellees can of course cite a few Eastern cases to the effect that in form or substance a mortgage conveys the legal title. None of the Western states has adopted that doctrine and most of the Eastern states have overruled it (*Jones on Mortgages*, 6th Ed. Sec. 59).

Conclusion

The instrument from the Copper Estate to Mathews and Syme is unquestionably only a mortgage. Under the deed from Messrs. Mathews and Syme, the Copper Estate acquired a legal title, subject only to the lien of the mortgage; and at the time of the commencement of this action, the Copper Estate still had the legal title.

It follows, therefore, that the first, second, fifth and sixth assignments of error should be sustained.

III

Parol evidence was not admissible to show the intended or expected legal effect of the mortgage and cannot be considered by the Court, even if received without objection.

As the instrument from the Copper Estate to Mathews and Syme is on its face a mortgage, we contend that parol or extrinsic written evidence was not admissible to vary its terms or legal effect. Even if such evidence was received without objection, the authorities uniformly hold that the Court is not permitted to consider it. At any rate the Court below ignored that testimony in the combined findings and decree.

We further contend that all the evidence in the case proves that nothing but a purchase money mortgage was intended.

Parol or Extrinsic Evidence Inadmissible

Parol evidence is, of course, admissible in all cases to prove that a *deed* absolute on its face is in fact a mortgage; but *parol or extrinsic written evidence is not admissible to contradict the terms or legal effect of a mortgage.*

The distinction is entirely logical and not arbitrary. An absolute deed is often demanded as security in a futile endeavor to avoid the necessity of foreclosing a mortgage; but even the most ignorant would not take a mortgage where an absolute conveyance was intended.

“Mortgages and deeds of trust are within the protection of the rule under discussion, and the terms and

legal effect of such instruments cannot be added to, varied, controlled or contradicted by parol or other extrinsic evidence. Thus it cannot be shown that a transaction evidenced by a written instrument which clearly appears on its face to be a mortgage was intended by the parties to be a conditional sale, an absolute conveyance or an assignment. It is also inadmissible to introduce parol evidence denying the personal liability of the mortgagor."

17 Cyc. 626.

1913 Cyc. Ann. 2022.

1914 Cyc. Ann. 318.

27 Cyc. 1023.

Jones on Evidence, Sec. 499.

Devlin on Deeds (3rd Ed.) Sec. 1144.

Eckford v. Berry, 87 Tex. 415; 28 S. W. 937.

"Parol evidence will not be received for the purpose of showing that the parties intended that a transaction evidenced by writings having the characteristics of a mortgage should constitute a sale, the maxim 'Once a mortgage, always a mortgage' applying."

20 A. & E. Ency. Law (2nd Ed.) p. 951.

The legal import of a paper, if clear, definite and complete, cannot be varied by parol or other extrinsic evidence.

21 A. & E. Ency. Law (2nd Ed.) 1084.

17 Cyc. 570.

U. S. v. F. & D. Co., 152 Fed. 596.

"The legal effect of a written contract, though not stated in terms in the writing itself, but left to be implied by law, can no more be contradicted, changed or explained by extrinsic evidence than if the legal implied effect had been expressed in the written terms."

(*Smith Co. v. Corbin*, 142 Pac. 1163, 1165—Wash., 1914.)

Lack of Objection Immaterial

The Courts reject parol or extrinsic written evidence to vary the terms or legal effect of a writing or to show the intent or meaning of the parties, not simply as a rule of evidence but essentially as a doctrine of substantive law. A Court is forbidden to heed such evidence, even though it was received without objection, as the law treats such evidence as immaterial.

Pitcairn v. Phillip Hiss Co., 125 Fed. 110, 113, 114.

Wigmore on Evidence, Sec. 2400.

1 *Greenleaf on Evidence* (16th Ed.) Sec. 350a.

Thayer on Evidence, p. 390 *et seq.*

21 *A. & E. Ency. Law* (2nd Ed.) 1079.

17 *Cyc.*, 570.

Stanton v. Granger, 125 App. Div. (N. Y.) 174; 179 N. Y. Supp. 134.

Gadden v. Inst., 80 Atl. 415, 419; 33 R. I. 177.

Appellees' Cases

In the Court below, counsel for the appellees relied chiefly on *Conway v. Alexander* (7 Cranch, 218), as authority for their offer of parol evidence to show that the instrument at bar was intended as a conditional sale.

In the Conway case, the instrument was not a mortgage in form. It was a conveyance wherein Alexander for £800 conveyed a tract of land to Lyles absolutely, and another tract to trustees, who, if Alexander paid them £700 with interest prior to a certain date, were to reconvey their tract to him, otherwise to Lyles. As distinguished from the case at bar, there was no debt or evidence of one, no covenant to make the payment, no defeasance clause, and no provision for a

foreclosure sale on default. As the paper was not in form a mortgage, evidence was of course admissible to show that it was intended as one; and the action was brought by the grantor's heirs to have the conveyance declared to be a mortgage. There are self-evident distinctions between the Conway case and the case at bar.

IV

There is neither allegation, proof nor finding of mistake.

The Bill does not allege mistake nor does the decree find it. No reformation of the instrument is sought. The appellees in any event would have no right to such relief as it would be personal to their grantors and would not pass by a conveyance of the property (*Morris v. Colorado Co.*, 43 Pac. 1024; 22 Colo. 162; and cases cited). Besides, such relief has long been barred by limitation and laches.

The Bill and the decree simply endeavor to fasten a new legal effect upon a mortgage and to have it declared an absolute reconveyance.

Mistake of Law

Assuming mistake to have been alleged, proved and found, the mistake would only be one of law, by an experienced real estate lawyer, as to the legal effect of filling out a printed mortgage blank.

“The rule admitting parol evidence in case a written instrument through mistake does not correctly express the intention of the parties applies only in cases of mistake of *fact* and not where a party has contracted under a mistake of *law*. In order to render parol evidence admissible to contradict the terms of a writing

on the grounds of mistake, it must clearly appear that such mistake was *mutual*."

17 Cyc. 705.

Utermehle v. Norment, 197 U. S. 40, 55, 56.

Upton v. Tribilcock, 91 U. S., 45, 50.

Laver v. Dennett, 109 U. S. 90.

Hunt v. Rousmanier, 1 Pet. 1, 15 (where the mistake was as to the nature of the security).

Quantum of Proof

Mistake must be proved by evidence that is "clear, unequivocal and convincing."

Maxwell Land Grant Case, 121 U. S. 325.

U. S. v. San Jacinto Tin Co., 125 U. S. 273, 300.

U. S. v. Budd, 144 U. S., 154, 161.

R. I. v. Mass., 15 Pet. 233, 271.

Conclusion

Capt. Mathews, who drew the mortgage, knew from his legal and business experience what it meant, and certainly had no "mistake" as to what it was (P. R., p. 59).

V

Analysis of Evidence.

Lay Testimony Without Value

Where a mortgage is to be construed, the testimony of lay parties is peculiarly without value, as the legal effect of the mortgage is implied by law and is seldom clearly expressed in the instrument.

No lawyer would be heard to say, after he had filled out a mortgage blank in the customary way, that he did not intend to create a mortgage. Capt. Mathews, one of the mortgagees and the only one of them who knew just what the

effect of the mortgage would be, drew the instrument; and the conclusive presumption is that he expressed the intention of Col. Syme and himself.

Every person of ordinary intelligence understands the general legal effect of a deed, note or lease. Only lawyers and the experienced of laymen understand the legal effect of a mortgage.

To the inexperienced layman, a mortgage means just what it is in form: a conveyance which can be defeated by the punctual payment of money, but which apparently becomes absolute on default.

The lay version of a purchase money mortgage transaction can be expressed in the mortgagor's usual statement: "If I pay the mortgage, I shall own the property; if I do not, I shall lose it." The necessity of foreclosure sale, implied by law into the wording of a mortgage, is something which must be learned and cannot ordinarily be found in the mortgage itself. The law does not even permit a mortgagor to contract in the mortgage transaction against his right of redemption.

Few laymen understand that if a foreclosure sale does not bring the amount of the debt, interest and expenses, the maker of the note or bond secured by the mortgage must ordinarily pay the difference. In some States a deficiency judgment is not allowed, and a mortgagee cancels the debt if he takes the property at the sale.

Col. Syme's Testimony

Col. Syme, seventy-seven years of age and an interested witness, had a confused recollection of what he had been told by Capt. Matthews fifteen years prior thereto, as to how and when the mortgagees would get back their property on default of the notes. As a matter of fact, Col. Syme stated that the mortgage itself expresses the transaction as he under-

stood it and he pointed to the defeasance clause to prove automatic reversion of title in the mortgagees. His construction of the defeasance clause is responsible for his testimony. Even he recognized that at least before the default in the notes, the Copper Estate had some title; this is the only reasonable explanation for his remarkable dissertation as to the "control" of the property (P. R., 48, 49).

Dorsey Statement

Senator Dorsey, after the lapse of fifteen years, repeated the defeasance clause practically *verbatim* in his statement and he, too, had a confused idea of its legal effect. Calling him to explain his statement was unnecessary and might have opened the door to all parol evidence. We discuss the Dorsey statement on pages 6 and 7 herein.

Understanding of Capt. Mathews

Undoubtedly Capt. Matthews said that if the notes were not paid, he and Col. Syme would get back the property. As an experienced lawyer, he knew that could be accomplished only by foreclosure. The supposition of any inexperienced layman is immaterial.

Any ignorance of the two lay parties as to the law of foreclosure, or their understanding or misunderstanding of the legal effect of the papers or the procedure necessary to accomplish it, cannot override the instrument prepared by the most qualified of the parties, who had the largest personal interest and the greatest incentive to make the papers accurate. The legal effect of a mortgage is implied by law and rigidly enforced, even against a contrary understanding or a concurrent contract against it.

In 1901, before the bar of the statute of limitations put a premium on confused lay recollections, Capt. Mathews and C. H. Syme, both lawyers, called the instrument a mortgage.

Unquestionably that was then the understanding of the mortgagees; and that would still be the understanding of their counsel, except for the exigencies of this case.

Best Evidence

The best evidence of what was intended is the mortgage itself, prepared by the best qualified of the parties, and there is no ambiguity in its silent testimony.

VI

All relief to plaintiffs is barred by limitations and laches.

It is conceded that nothing was ever paid on the mortgage or the notes nor any action brought therein. The mortgagees "ignored the paper entirely" (P. R. 47).

We contend that since July 16, 1906, even before the appellees became interested as attorneys or trustees, the mortgage and the debt secured thereby have been barred by the Arizona statutes of limitation and the laches of the mortgagees.

Running of Limitation Statutes

Full legal title to the tract at bar, specifically located in 1863 by the description set out in the decree herein, passed from the United States on April 9, 1864 (*Lane v. Watts*, 234 U. S. 525; 235 U. S. 17). The technical right of possession against the United States did not accrue until the filing in December, 1914, of the plot of survey; but this has no bearing upon the statutes of limitation for a non-possessory action such as foreclosure (*Castro v. Adams*, 153 Cal. 382; 95 Pac. 1027).

Arizona Limitation Rule Followed

The Arizona limitation statutes and decisions are controlling

on this Federal Equity Court in mortgage foreclosures, especially as the sole ground of its jurisdiction thereover is diversity of citizenship, concurrent with that of law on the notes.

Dupree v. Mansur, 214 U. S. 161, 167.

Elwell v. Daggs, 108 U. S. 143, 147.

Lewis v. Marshall, 5 Pet. 470.

Baker v. Cummings, 169 U. S. 189, 206, 208, 209.

Godden v. Kimmel, 99 U. S. 201, 210.

Teall v. Schroder, 158 U. S. 172, 178, 179.

O'Brien v. Wheelock, 184 U. S. 450, 493.

Curtney v. U. S. 149 U. S. 662, 674, 675.

Willard v. Woods, 164 U. S. 502, 520.

Bauserman v. Blunt, 147 U. S. 647.

Arizona Foreclosure Limitation

The laws of the state where the action is tried govern on the question of limitation (*Union Pac. R. R. Co. v. Wyler*, 158 U. S. 285, 289).

The Arizona Supreme Court has held that under R. S. Ariz. 1887, Secs. 2310, 2314 (both as amended by L. 1891 p. 74), 2316 and 2327, the pertinent foreclosure limitation (as the mortgage and the notes were not executed in Arizona) was five years from the maturity of the notes; and that under R. S. Ariz. 1901, Secs. 2954, 2956 and 2874, the time was four years, but claims against which the statute had started to run retained the limitation time of the former statute.

Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.

Provident Ass'n v. Schwertner, 15 Ariz. 517, 518; 140 Pac. 495.

Schwertner v. Provident Ass'n, 17 Ariz. unreported; 148 Pac. 910.

"A court of equity is equally bound with a court of

law by the statutes of limitation" (*Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 8).

These constructions by the Arizona Supreme Court of the statutes of limitation of that state are binding on United States courts (*Bauserman v. Blunt*, 147 U. S. 647).

The Copper Estate is an Arizona corporation and is a "person" within the meaning of the limitation acts (R. S. Ariz. 1887, Sec. 2932, subd. 3).

Applicability to Purchase Money Debts

The statute of limitation can be set up against a purchase money debt.

Dupree v. Mansur, 214 U. S. 161, 166, 167

Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.

Anderson v. Baxter, 4 Ore. 105.

There is nothing discreditable in the plea (*Dupree v. Mansur*, *supra*, p. 167; *Wood v. Carpenter*, 101 U. S. 135, 139; 19 A. & E. Ency. Law (2nd Ed.) 151, 152); and the language of the statute must prevail (*Amy v. Watertown*, 130 U. S. 320, 324).

When a mortgage is only a security for a debt, it is barred when the debt is barred, in the absence of a contrary statute.

Dupree v. Mansur, 214 U. S. 161, 167.

Elwell v. Daggs, 108 U. S., 143.

Cleveland Ins. Co. v. Reed, Fed Cases 2889.

Holmes v. Bennett, 14 Ariz. 298, 300; 127 Pac. 753.

Provident Ass'n v. Schwertner, 15 Ariz. 517, 518.

Schwertner v. Provident Ass'n, 17 Ariz. unreported; 148 Pac. 910.

Blackwell v. Barnett, 52 Texas 326.

Grantee May Plead Limitation

The grantee of the Copper Estate, whose deed was not made

subject to the mortgage, also has the benefit of the limitation statutes.

Sanger v. Nightingale, 122 U. S. 176, 184.

Elwell v. Daggs, 108 U. S. 143, 147, 148.

19 *A. & E. Ency. Law* (2nd Ed.) 184.

Laches

Laches alone bars the appellees' claim. This action was commenced about fifteen years after the mortgage was given, and about thirteen years after the last note matured.

An action may be barred by laches even before it would be barred by limitation and the laches period is never longer than the time in the limitation statute.

Hayward v. National Bank, 96 U. S. 611, 617

Martin v. Gray, 142 U. S. 236, 239.

Metropolitan Bank v. St. Louis Dispatch Co., 149 U. S. 436, 444, 450.

O'Brien v. Wheelock, 184 U. S. 450, 493.

Patterson v. Hewitt, 195 U. S. 309.

Alsop v. Riker, 155 U. S. 448, 460.

Castro v. Adams, 153 Cal. 382; 95 Pac. 1027.

The mortgagees did not care to go to the trouble and expense of foreclosing their mortgage, although from time to time they had various sets of attorneys (P. R. 42, 43, 45); they "ignored the paper entirely" (P. R. 47).

The appellees themselves did not acquire any interest until over a year after the mortgage and notes were barred by limitation.

Relief for Mistake Barred

There is neither allegation, proof nor finding of mistake. Any "mistake" would only be one of law by an experienced lawyer as to the legal effect of a mortgage. This we discuss in Point IV.

At any rate, the bar of the statutes of limitation as to mistake was pleaded, and they have long since barred any relief for mistake.

Conclusion

The form of this action and the contention of a conditional sale constitute a practical recognition of the bar of the statutes of limitation. If those statutes were not involved, we believe that the appellees would have started a foreclosure action instead of an action to declare a conditional sale.

VII

There was no power of extra-judicial sale nor any attempt to exercise such a power.

In the Court below, counsel for the appellees argued only that the two instruments of August 3, 1899, constitute a conditional sale; and that if the two documents were of themselves insufficient for such a determination, parol evidence was admissible to prove a conditional sale, because of supposed ambiguity in the mortgage. We believe that we have fully answered both of these contentions and that the decree should be reversed and the Bill dismissed on the merits.

No Sale Nor Power of Sale

Before the trial, counsel for the appellees, in the second amendment to the Bill (P. R. 17, 18), contended that there had been a foreclosure of the mortgage because of the deed to the appellees; but no such contention was made on the trial or the argument in the Court below.

Under the heading "Foreclosure Clause" on pages 13 and 14 herein, we have demonstrated that there was no power

conferred by the mortgage to sell in any way than under a decree in a foreclosure action.

The testimony of Col. Syme proves that there was no attempt to exercise any supposed power of sale, because he testified that the mortgagees made no attempt to sell the property and "ignored the paper entirely" (P. R. 47). Counsel for the appellees also conceded that there had been no sale on notice or advertisement or by action (P. R. 61).

At any rate, as the appellees are trustees (at least to a substantial extent) for their grantors, the surviving mortgagee and the representatives of the deceased mortgagee (P. R. 45, 60), any alleged sale to the appellees is absolutely void, as a private conveyance from trustees to themselves (*Perry on Trusts*, 5th Ed. Secs. 602v and 602w). A trustee cannot directly or indirectly be both grantor and grantee of the trust estate.

Foreclosure in Arizona can now be had only by action in equity, even under power of sale mortgages executed prior to the codification of 1913 (*Schwertner v. Provident Ass'n*, 17 Ariz. unreported; 148 Pac. 910).

VIII

Neither Mrs. Mathews nor Mrs. Syme had community rights.

The contention that Mrs. Mathews and Mrs. Syme had community rights, which survived the conveyance of August 3, 1899, has been abandoned (P. R. 47). Counsel for the appellees recognized that there were no community rights, as the husbands were born and married and always resided in jurisdictions where the dower system prevailed. This rule

has been sustained by the courts of California, Washington, Texas, Louisiana, New Mexico, Idaho, Alabama and by the United States Supreme Court. The only contrary case, *Heidenheimer v. Loring* (26 S. W. 99; 6 Tex. C. A. 568), was directed overruled by *Thayer v. Clarke* (77 S. W. 1050, affirmed in 81 S. W. 1274) and by many other Texas cases.

IX

The appellant was properly incorporated and its corporate existence cannot be attacked by the appellees.

The Copper Estate was duly incorporated in 1899. No filing of the Articles of Incorporation was then required in any territorial office. At any rate the lawfulness of the incorporation or the present corporate existence can only be assailed in a direct action by the state of Arizona (*10 Cyc. 223; Wells Co. v. Gastonia*, 198 U. S. 177).

In both the deed and the mortgage the Copper Estate was described as a corporation, and Messrs. Mathews and Syme took a mortgage and notes from it executed in its corporate name and under its corporate seal. They and their successors in interest are, therefore, absolutely estopped from denying the existence of the corporation for the purpose of litigation over the instruments.

10 Cyc. 245, 246.

Agua Co. v. Bashford Co., 4 Ariz. 203.

Andes v. Ely, 158 U. S. 312, 322.

Chubb v. Upton, 95 U. S. 665.

Tulare District v. Shepard, 185 U. S. 1.

2 Cook on Corporations (7th Ed.) Sec. 637.

The record shows not only a proper incorporation (P. R.

57, 58) but also an organization of the corporation (P. R. 49 to 51). It held a title for over fifteen years to a tract of Arizona land. That in itself is a continuous user of the corporate franchise (10 Cyc. 1282; 1913 Cyc. Ann. 1175).

The decree should be reversed and the bill dismissed on the merits, with costs.

Respectfully submitted,

J. N. GILLET,
F. A. CUTLER,
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Counsel for Appellant.

Additional authorities cited by F. A. Cutler in his oral argument, and inserted by permission of the Court.

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A written contract expresses in the absence of fraud or mistake the final conclusion reached, and prior and contemporaneous verbal discussion or written memoranda are assumed to be either rejected or merged in it.

Goldensberg v. Taglino, 145 N. E. 383
In re Brown's Estate, 148 N. E. 121
Vance v. Allison et al, 85 N. E. 776
Swift v. Moore, 82 N. E. 914

The intention of the parties to a deed must be gathered from its four corners.

Garrett v. Litze, 161 N. E. 684
Yeager v. Farnsworth, 148 N. E. 87
Bridgewater etc. vs. Fredericksburg
Lower Co. 82 N. E. 173
Pendrey v. Godwin, 66 So. 43

"To sell according to law" means to sell at public outcry by virtue of an execution issued on a judgment of foreclosure.

Brickell v. Batchelder, 62 Cal. 636
Hall v. Jameson, 181 Cal. 614
Copper Belle Min. Co. v. Costello, 18 Ariz. 316

Ords in a contract are to be construed against the party using them if there is any ambiguity.

Garrison v. U. S. 7 Wall. 688

Courts of equity will not assist parties when their condition is attributable to a failure to exercise ordinary care for their own protection. Specially is this so where the parties are their own contract and one of them is a lawyer conversant with legal contracts and their effect.

Great Eastern Bldg. Co. v. Adams, 171 Fed. 326

In Appellees' main brief, at page 26, the statement is made that a mortgagor's assignee cannot quiet title against a mortgagee in possession without paying the debt, and Ruggio v. Milata, 155 Cal. 727 is cited. In Faxon v. All Persons, 136 Cal. 77, the court in banc held that a mortgagor's assignee who had ^{not} assumed or agreed to pay the debt could quiet title without paying the mortgage; and Uhl v. Libernia Society, 136 Cal. 762 is to the same effect. In the Faxon case, the Ruggio case is discussed and distinguished. But appellant herein does not seek to quiet title; it only asks for a dismissal of the bill.

10

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 2663.

ARIZONA COPPER ESTATE, a Corporation,
Appellant,
vs.

CORNELIUS C. WATTS and DABNEY C. T. DAVIS, JR.,
Appellees.

BRIEF ON BEHALF OF APPELLEES.

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Filed

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

No. 2663.

ARIZONA COPPER ESTATE, a corpo-
ration,

Appellant,

vs.

CORNELIUS C. WATTS and DABNEY
C. T. DAVIS, JR.,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

Statement of the Case.

This is an appeal by the Arizona Copper Estate from a decree of the District Court of the United States for the District of Arizona (Rec., pp. 63-67), filed April 2, 1915, in which the Court found that the two instruments (rec., pp. 72, 73, 77-80) are to be construed as one instrument, and constitute a conditional sale of certain land in Santa Cruz County, Arizona, for \$100,000, to be paid according to the tenor and effect of certain notes; that the condition was not performed, and that no part of said sum of \$100,000 was ever paid; that the defendant (Appellant Arizona Copper Estate) acquired no right, title or interest, under or by virtue of the instruments, in the land

or any part thereof ; and thereupon the Court adjudged that the full legal title to the said land was in the plaintiffs ; that said instruments constituted a cloud upon the plaintiffs' title ; that the title to the land was quieted in the plaintiffs against the defendants and each of them, and all persons claiming under them or any of them, and that the defendants and each and every one of them, and all persons claiming under them or any of them, be barred and estopped from having or claiming any right or title to the said land.

In the Court below certain other persons were joined as defendants, but they defaulted at the hearing and, though notice that the Arizona Copper Estate would appeal was given them and they were required to join in the appeal (rec., pp. 84, 85) they failed to do so ; so that the Arizona Copper Estate is the sole appellant.

Statement of Facts.

On August 3, 1899, Captain Alexander F. Mathews and Samuel A. M. Syme were the owners of the land described in the complaint situate in Santa Cruz County, State of Arizona, and which is particularly described by courses and distances in the complaint (rec., p. 3).

For some time prior to August 3, 1899 (rec., p. 31), negotiations had been in progress between Mr. Syme and Senator Stephen W. Dorsey for the sale of the property ; an option first having been proposed (rec., p. 32), to which Senator Dorsey objected on the ground that he wished a deed as he could handle the property better in that way (rec., p. 32) ; and which negotiations resulted in an agreement that Senator Dorsey should pay Mr. Syme personally \$5,000 (rec., p. 32) for procuring the deeds of the property and arrange for the payment of \$100,000, no title to pass unless the \$100,000 was paid (rec., pp. 32-34). The papers Plaintiffs' Exhibits B and C (rec., pp. 72-80) were drawn up at Senator Dorsey's office in New York (rec., p. 34).

Mr. Syme testified (rec., p. 32) :

" We first talked about an option and we couldn't agree on that because he wanted a deed, because he said that he thought he could use that better. I had made

the proposition that I would sell him that property for \$5,000 cash to me personally for procuring the deed, and he wanted to give me a deed in exchange at the same time."

Mr. Syme says (rec., p. 35) :

"My dealings were entirely with Senator Dorsey and I made my agreement with Senator Dorsey. And Dorsey conducted the entire transaction vis-a-vis me and Captain Mathews. There was nobody else."

Again (rec., p. 37) :

"Dorsey gave directions to Mathews how to draw the papers and Dorsey told Captain Mathews to put in the name Arizona Copper Estate as grantee in one paper and grantor in the other. Prior thereto I had never had any dealings with nor heard of the Arizona Copper Estate. My dealings have been entirely with Dorsey. Notes aggregating \$100,000 were written out and signed by the Arizona Copper Estate by Jas. Simmons, Vice-President" (rec., p. 37).

"If the notes were not paid—all the notes were not paid—the property was to remain in us (Mathews and Syme) and the notes were to become void and the whole thing wiped out (rec., p. 34).

"It was stated by Captain Mathews, or by me, or by Senator Dorsey, at the meeting of August 3, 1899, that if these notes were not paid the whole thing amounted to nothing and we stood just as we did before, that the whole transaction would be null and void, including the notes and that the title would be in Mathews and myself if all the notes were not paid and we would get the property" (rec., p. 44).

Again Mr. Syme testified that in the presence of Senator Dorsey

"I just simply asked Captain Mathews what would be the nature of the case if these notes were never paid.

He says the property will stand just as it did before—that is the title in Mathews and myself ” (rec., p. 46).

Mr. Syme also testified :

“ I considered the paper in the nature of an option and that it conveyed the property to the Copper Estate and that it reconveyed it to us to secure the property to us if the notes were not paid. * * * ” (rec., p. 48).

It was conceded by the Arizona Copper Estate that no payment was made on the notes (rec., p. 37) ; and that the property described was segregated from the public domain by the filing of the plat of survey in December, 1914, and that the property at the time of the commencement of the action and at the time of the hearing exceeded in value the jurisdictional amount (rec., p. 49).

It does not appear that the Arizona Copper Estate ever did anything in connection with this property in the way of taking possession of it or exercising any acts of ownership in connection therewith, or of control over it ; and Mr. Syme testified that “ understanding that the whole thing has been abandoned ” (rec., p. 39) “ in the Fall of 1900 or thereabouts he went to see William H. Reynolds who it appears from the testimony of his grandson (rec., p. 50) was President of the Copper Estate at the time of the transaction, in reference to the purchase of the property (rec., pp. 39, 40).

During the course of the trial a motion was made by the plaintiffs (appellees) that the attorney for the Arizona Copper Estate be required to show under what authority he was acting for the Arizona Copper Estate ; and, when required to do so by the Court (rec., pp. 35-37), Mr. Hill produced a telegram signed “The Arizona Copper Estate by Stephen W. Dorsey, President.”

Thereafter the plaintiffs (appellees) offered in evidence a sworn statement of Senator Dorsey (rec., p. 52), as to which the Counsel for the Arizona Copper Estate said (rec., p. 54). “ We consent to the admission of this paper as a declaration against interest.”

It appearing that Dorsey was president when the telegram was signed, the presumption is that he was president when he made the affidavit (Wigmore, sec. 437).

That paper is printed at length (rec., pp. 81-83). In it Senator Dorsey says (rec., pp. 81, 82) :

" It was finally agreed that the purchase price of the property should be One hundred thousand (\$100,000) Dollars, to be paid in various sums and at various times running over about two years. My plan was to form a corporation to which the property could be deeded and which could then raise on the property a sum sufficient to pay the purchase price. It was, therefore, arranged that the property should be deeded to the corporation, but as the sale was not to be made unless and until the price was paid, it was arranged that the corporation would reconvey the property to the then owners subject to the divestiture if the purchase price was paid as agreed.

* * * * *

This form was adopted as the simplest and the one which would enable the corporation to handle the property easiest in raising the money required. There was never any intention that in case the corporation should not be able to raise the money, it should be indebted to those named in the amount of the notes or in any amount. All the parties knew that the corporation was to be organized to handle this proposition and that it had and expected to have no other assets but what it could make out of this property.

" Soon after the deeds were made, I went to the Interior Department at Washington, D. C., to investigate the condition of the title to the Float. Before starting the corporation going, but after consulting fully with the attorney for the Land Office, I found out that the title to the property was so complicated that nothing could be done with it in a commercial way and I then and there decided to abandon the whole transaction. * * *

" Nothing further was done in the matter by me or my associates and my understanding has always been and is now that the transaction on account of the failure of the Arizona Copper Estate to make the payments agreed on was as though it had never taken place and

that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation or of the Arizona Copper Estate itself."

As showing the impression made upon the court by the reading of this confession by the man who conducted the negotiations, engineered the putting into shape the formal contract and organized and controlled the Arizona Copper Estate and who, as President of that corporation, employed the attorney in this case and authorized him to defend the suit according to that attorney's own showing, attention is called to the colloquy between the court and defendant's counsel appearing in the record (rec., pp. 52-54).

An examination of the notes which are recited in the instrument (rec., 77-80), which appellants claim to be a mortgage corroborates Col. Syme that the \$5,000 was paid to him personally for the option, as he termed it.

It appears that the notes aggregated \$100,000 (rec., p. 79); that Mathews received notes for \$26,758; Mathews as trustee for Miss Eldredge received notes for \$20,000, Syme received notes for \$29,121 (rec., p. 61, 62), and presumably the balance \$24,121 went to Boyce. Consequently the \$1,000 paid Mathews out of the \$5,000 was deducted from the notes given him and added to those given Syme as was the \$2,000 deducted from the notes given Boyce and added to those given Syme.

Syme testified (rec., p. 34) :

" The \$5,000 was not to be a part of the purchase price but was to come to me personally. He was to pay me \$5,000 for giving him an option for a certain period."

and (rec., p. 41) :

" The \$5,000 which passed in New York was Dorsey's checks, one for \$2,000 to me, another for \$1,000 less the war stamps to Capt. Mathews and another to Boyce for \$2,000. The notes were then and there divided

between Mathews, Boyce and myself, Boyce receiving about \$25,000."

and (rec., p. 43) :

" Capt. Mathews as trustee received \$20,000 of the notes. Capt. Mathews personally \$26,758, Col. Boyce \$24,121 and I received \$29,121 of the notes. Of the \$5,000 of my individual money I gave \$1,000 of it to Capt. Mathews because he had been to a great deal of expense in this business and had done a lot of work. That \$1,000 was deducted from his original share of the notes. The same was with reference to the \$2,000 to Boyce. Under the circumstances I thought that when we were getting \$100,000 for our interest in the Float we were getting a good price for it. I directed Senator Dorsey to give Mathews and Boyce checks for \$1,000 and \$2,000 respectively."

There was no debt created nor did any debt exist. Simply if the Arizona Copper Estate paid \$100,000 at the times and in the manner described in the notes it would acquire title to the land.

Syme testified (rec., p. 46) :—

" Neither Capt. Mathews nor myself borrowed any money from the Copper Estate, nor from Senator Dorsey, Simmons nor Philip K. Reynolds."

and (rec., p. 46) the witness stated, under objection of the defendant and exception, that neither he nor Capt. Mathews borrowed or loaned or owed any money to any of the persons or the corporation above named, and that neither Senator Dorsey nor the Copper Estate nor any of the persons named on that day owed any money to Mathews or Syme ; and Syme testified further (rec., p. 46) :—

" Q. You neither borrowed or loaned ?

" A. Oh, no, there was no money transaction of that kind."

Dorsey's testimony to the same effect has been quoted.

There was no evidence in contradiction of or in conflict with the foregoing and the contract testified to by Syme and Dorsey is in support of and not in conflict with the papers themselves according to the natural purport and meaning of the language used.

In *Bogk v. Gossert*, 149 U. S., 17, the court says of *Wallace v. Johnstone*, 129 U. S., 28 :

“ The purport of this case is that in the absence of proof of a debt or other explanatory testimony the parties will be held to intend exactly what they have said upon the face of the instruments.”

Read together the two papers clearly provide that if the Arizona Copper Estate shall pay the \$100,000 as agreed it shall have the property. The promise to pay is not inconsistent with this. If the covenant as to the power to sell be so considered, it alone can not make the instrument a mortgage where there is no debt to be secured. That is the *sine qua non* of a mortgage (Words and Phrases, v. 5, p. 4601 and cases cited) and both Syme and Dorsey testify that there was no debt here and there is nothing to contradict them.

The foregoing statement of facts would seem to render a discussion of the law unnecessary.

POINTS.

I.

The intention of the parties controls if consistent with the principles of law and to ascertain such intention all the surrounding circumstances are to be considered.

In *Hollingsworth v. Fry*, 4 Dall., 345, the court says (p. 347) :

“ The great rule of interpretation with respect to deeds and contracts is to put such a construction upon them as will effectuate the intention of the parties if such intention is consistent with the principles of law.”

The real principle upon which this case turns is stated in *Russell v. Southard*, 12 How., 139, where the court says (p. 147) :

“ To insist on what was really a mortgage as a sale is in equity a fraud which cannot be successfully practiced under shelter of any written papers however precise and complete they may appear to be.”

This was said in reference to a deed which it was claimed was a mortgage but the fact that such cases are more numerous than those in which a paper in the form of mortgage is claimed to be a conditional sale does not affect the application of the principle to the latter class of cases.

It is a primary canon of interpretation that the intention of the parties controls, if to do so violates no rule of law.

Reeds vs. Proprietors of Locks & Canals, 8 How., 274.

Newson v. Pryor, 7 Wheat., 7, 10.

Holmes v. Trout, 7 Pet., 171.

St. Louis v. Rutz, 138 U. S., 226, 243.

St. Clair Co. v. Lovington, 23 Wall., 46.

Meredith v. Pickett, 9 Wheat., 573.

McKey v. Hyde, 134 U. S., 84, 95.

Morris v. United States, 174 U. S., 196, 246.

Reloj Cattle Co. v. United States, 184 U. S., 624, 637.

Ainsa v. United States, 161 U. S., 208.

Ely v. United States, 171 U. S., 220.

United States v. Maish, 171 U. S., 242.

Perrin v. United States, 171 U. S., 292.

In *Cavazos v. Trevino*, 6 Wall., 773, the court held that in construing a grant the circumstances attendant at the time it was made are competent evidence for the purpose of placing the court in the same situation and giving it the same advantage for construing the papers which are possessed by the actors themselves.

In *United States v. Gibbons*, 109 U. S., 200, the court says :

“ Where the language is susceptible of two meanings the court will infer the intention of the parties and their relative rights and obligations from the circumstances attending the transaction.”

In *Rock Island Railway v. Rio Grande Railroad*, 143 U. S., 596, the court says (p. 609) :

“ In the interpretation of any particular clause of a contract, the court is not only at liberty but required to examine the entire contract and may also consider the relations of the parties, their connection with the subject matter and the circumstances in which it was signed.”

In *Vance v. Anderson*, 113 Cal., 532, 45 Pac., 816, the court says (p. 538) :

“ Equity * * * shapes its relief in such a way as to carry out the true intent of the parties to the agreement ; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relation to one another and to the subjects matter are subjects for consideration.” Citing *Campbell v. Freeman*, 99 Cal., 516, 34 Pac., 113 ; *Peirce*

v. Robinson, 13 Cal., 116 ; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957 ; *Ross v. Bruise*, 64 Cal., 245, 30 Pac., 811 ; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399.

In *Sadler v. Taylor*, 38 S. E., 583, the court says (p. 590) :

“ In ascertaining what the intention of the parties was at the inception of the transactions it is proper to consider the parole declarations of the parties and the evidence of other witnesses together with the situation, circumstances and conduct of the parties respecting such transactions prior to, at the time of and after the execution of the deed.”

The intention is the controlling element in the construction of a deed.

Tiernan v. Jackson, 5 Pet., 580.
Stanley v. Colt, 5 Wall., 119, 166.
Calhoun Co. v. Am. Emigrant Co., 93 U. S., 124.
Pawlet v. Clark, 9 Cr., 292, 330.
Brown v. Jackson, 3 Wh., 449.
Reed v. Props. Locks & Canal, 8 How., 274, 288.
Steinbach v. Stewart, 11 Wall., 566.
Phila., etc., R. Co. v. Howard, 13 How., 307.
Irvin v. United States, 16 How., 513.
Williams v. Paine, 169 U. S., 55, 76.
Hughes v. Edwards, 9 Wh., 489, 494.
Hollingsworth v. Fry, 4 Dall., 345.
United States v. Arredondo, 6 Pet., 691, 740.

Other cases supporting the same principles are :

Mauson v. Bullus, 16 Pet., 528, 533.
United States v. Peck, 102 U. S., 64, 65.
Atkinson v. Cummins, 9 How., 479, 486.
Good v. Martin, 95 U. S., 90, 95.
Burdell v. Denig, 92 U. S., 716, 722.
Roy v. Simpson, 22 How., 341, 350.
The Confederate Note Case, 19 Wall., 548, 549.
Bell v. Bruen, 1 How., 169.
Montana Min. Co. v. St. Louis Min. Co., 204 U. S., 204, 214.
Mobile, etc., R. Co. v. Jurey, 111 U. S., 584.
Merriam v. United States, 107 U. S., 437, 441.
Canal Co. v. Hill, 15 Wall., 94.
United States v. Granite Co., 105 U. S., 35, 39.

There are number of State cases in which the question was whether the instrument in question was a mortgage or a conditional sale, in which the principles controlling are very well set forth and in which it is held that in determining whether it is a mortgage or conditional sale the intentions of the parties is controlling and that the true nature and intention is to be determined by the circumstances of each particular case, among which cases are :—

Chapman v. Turner, 1 Call, 294, and note.

Chase's Case, 1 Bland's Chan., 206, 17 Am. Dec., 277, 292 note.

Cornell v. Hall, 22 Mich. 383.

Voss v. Eller, 109 Ind., 264.

Alleghany R. R. Co. v. Casey, 79 Pa. St., 84, 97.

Bridges v. Linder, 60 Iowa, 190, 192.

Devore v. Woodruff, 1 N. D., 143, 148.

Smith v. Crosby, 47 Wis., 160, 166.

Flagg v. Mann, 14 Pick., 467, 480.

Johnson v. Clark, 5 Ark., 321, 342.

Hollingsworth v. Handcock, 7 Florida, 338, 346.

Whelan v. Schwartz, 1 Yeats, 579.

Southern Street Railway Co. v. Metropole Shoe Co., 46 Atl., 573.

Bigler v. Jack, 87 S. W., 700.

In *Devore v. Woodruff*, *supra*, the court speaks of the right of a conditional vendee as an "optional right," thus confirming Syme's characterization of the contract in this case.

In *Conway's Executors v. Alexander*, 7 Cr. (11 U. S.), 218, in which Chief Justice MARSHALL delivered the opinion, there was a bill to redeem on the theory that the conveyance was a mortgage. The court said among other things (p. 240) :

"This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the payment of money advanced, no proposition for or conversation about a mortgage, it is a case in which one party certainly considered himself as making a purchase and the other appears to have considered himself as making a conditional sale."

And it was held : parol evidence having been admitted, that it was a conditional sale. An analysis of this case shows that it

is a very strong authority for appellees since in it the instrument was clearly a deed of trust.

This case was followed in *Russell v. Southard*, 12 How., 139. The Court said (p. 147) :

“It is insisted on behalf of the defendants that this question (whether a deed was what it purported to be) is to be determined by the inspection of the written papers alone, oral evidence not being admissible to contradict, vary, or add to their contents. But we have no doubt extraneous evidence is admissible to inform the Court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority. To insist on what was really a mortgage as a sale is in equity a fraud which can not be successfully practiced under shelter of any written papers however precise and complete they may appear to be.”

The foregoing cases have been uniformly followed.

In *Kuhn v. Fairmont Coal Co.*, 215 U. S., 349, the Court said (pp. 363, 364) :

“In *Russell v. Southard*, 12 How., 139, 147, the controlling question was whether in any case it was admissible to show by extraneous evidence that a deed on its face of certain real estate in Kentucky was really intended by the parties as a security for a loan and as a mortgage. The court, speaking by Mr. Justice CURTIS, after citing adjudged cases sustaining the proposition that evidence of that kind was admissible in certain States, said :

‘It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any State statute, but upon the principles of a general equity jurisprudence, this court must be governed by its own views on those principles.’ ”

In *Cabrera v. American Colonial Bank*, 214 U. S., 224, the court said (pp. 230, 231) :

“ In other words, the real transaction is permitted to be proved. The court said in *Peugh v. Davis*, 96 U. S., 332, 336, and repeated it in *Brick v. Brick*, 98 U. S., 516 :

‘ As to the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible.’

The rule which excludes parole testimony, the court further said, has reference to the language used by the parties and does not forbid an inquiry into their object in executing and receiving the instrument.”

In *Jackson v. Lawrence*, 117 U. S., 679, the Court said (p. 681) :

“ It is also settled that evidence written or oral may be admitted to show the real character of the transaction.”

In *Watts v. Camors*, 115 U. S., 353, the Court said (p. 362) :

“ If it is considered as a question of the remedy and relief to be judicially administered, the equity and admiralty jurisdiction of the courts of the United States, under the national Constitution and Laws, is uniform throughout the Union, and cannot be limited in its extent, or controlled in its exercise, by the laws of the several States.”

in *Babcock v. Wyman*, 60 U. S., 289, the Court said (p. 299) :

“ Can the trust be established by parol testimony ? If the doctrine of this court is to be adhered to, as laid down in the case of *Russell v. Southard* (12 How., 154), this is not an open question. In that

case the court say: 'To insist on what was really a mortgage, as a sale, is in equity a fraud.' And in *Conway v. Alexander* (7 Cranch, 238), Chief Justice Marshall says: 'Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or a mortgage.' In *Morris v. Nixon* (1 How., 126), the court say: 'The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face.' "

In *Glover v. Payn*, 19 Wend (N. Y.), 518, the action was of ejectment. This case is very illuminating. Here was an action at law, and yet even in such a case, the Court applies the principle now contended for. The Court there said (BRONSON, J.) (p. 520):

"The deed of Payn and the lease or agreement, were executed at the same time and it is of no consequence that they bear date on different days. The Judge decided that the two instruments together amounted in law to a mortgage. I think he erred. * * * De-feasible purchases are narrowly watched * * * Still it is well settled that an agreement to reconvey either with or without an advance in price will not turn an absolute conveyance into a mortgage * * *

"(p. 521) But where there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute conveyance into a mortgage * * *

"(p. 522) Until the courts are prepared to make contracts for parties and to assume the guardianship of adults as well as infants, such a transaction as we have been considering can not be declared a mortgage. It is an absolute sale with a agreement for reconveyance; and the vendor must comply absolutely with the terms on which he is allowed to re-possess himself of the title, or his right will be at an end."

In *Reich v. Cochran*, 213 N. Y., 416, there were four instruments in writing dealing with a lease of certain premises in the City of New York. The action was to redeem from a mortgage, it being claimed that the instruments in legal effect constituted a mortgage upon the demised premises and all the furniture, fixtures and personal property thereon. The Court said (p. 422) :

“ The assignment and the collateral agreement to reassign on stated terms do not on their face constitute a mortgage. It will be necessary for the plaintiff to show by parol that the assignment was given as security for the payment of a debt. That he may do that in equity is well established (*Horn v. Keteltas*, 46 N. Y., 605; *Odell v. Montross*, 68 N. Y., 499; *Russell v. Southard*, 12 How., U. S., 139). ”

In *MacDonald v. Crissey*, 215 N. Y., 609, a printed form of contract was used and the name of the vendor was not changed; but the Court held that extrinsic evidence was admissible to show what the actual contract was and with whom it was.

That parol evidence is admissible under circumstances such as in the case at bar is established by a host of authorities. If it is desired to consult further cases, they are collected in the Century Digest, vol. 35, under the title “ Mortgages,” Sec. 97; Dec. Digest, vol. 14, title “ Mortgages,” sec. 37, and in the Key Number Digest under the same title, sec. 37.

The parol evidence was not offered to change, alter, modify, or add to the language of the written instruments; but to show what the real contract between the parties was to prevent fraud being practiced by holding that to be a deed, absolutely conveying the property with a purchase money mortgage back, which was really a conditional sale, the condition of which was admittedly never performed (*Russell v. Southard*, *supra*, p. 147); nor is there here any attempt to reform the instruments, but the Court was asked as a preliminary to giving the relief asked, the quieting of the title and removal of cloud, to find that under the facts the legal effect of the transaction was a conditional sale.

Under the authorities parole evidence is admissible for

this purpose ; and there was no error in the court below admitting and considering the testimony as to the legal effect of the transactions and the intention of the parties with reference thereto ; nor in admitting and considering the testimony of Samuel A. M. Syme, that, in case the notes were not paid, the land should remain the property of himself and Mathews ; that no sale was to be deemed to be made unless all the notes were paid and that, in case the notes were not paid, they as well as the deed and reconveyance should be void ;

This disposes of the appellant's third and fourth assignments of error.

II.

The deed from Alexander F. Mathews and S. A. M. Syme to the Arizona Copper Estate, and the Reconveyance by the Arizona Copper Estate to said Mathews and Syme, were properly found in legal effect to be one instrument and to constitute a conditional sale.

There is no question that the two papers were executed simultaneously and as part of a single transaction.

Mr. Syme testified (rec., p. 35) :

“ Both these papers were executed and delivered simultaneously.”

They bear the same date and every indicia of this being a fact.

As said in *McKelvain v. Allen*, 58 Tex., 383, with reference to a deed of property and notes for the unpaid purchase money,

“ The notes and deed will be construed as one instrument and as an executory contract to sell land.”

The cases cited under the preceding point also support this proposition, and it is not deemed necessary to cite further authority.

A court of equity looks beyond the terms of the instrument to the real transaction ; it will give effect to the actual contract of the parties. Any evidence, written or oral, which tends to show this is admissible. The rule which includes parol evidence does not go to evidence showing the purpose and object of the parties. Jurisdiction will always be exercised in equity to prevent fraud and oppression and to promote justice.

Brick v. Brick, 98 U. S., 516.

Peugh v. Davis, 96 U. S., 336.

As said in *Simon v. Etgen*, 213 N. Y., 589, at page 595,

“ equity looks through the form to the substance and purpose of the agreement, and moulds its decree in accordance with what the parties may fairly be presumed to have intended.”

In *Vance v. Anderson*, 113 Cal., 532, 45 Pac., 818, the Court says :

“ Equity looks through the mere form in which the transaction is clothed and shapes its relief in such a way as to carry out the true intent of the parties to the agreement ; and to this end all the facts and circumstances of the transaction, the conduct of the parties thereto, and their declarations against their own interests, and their relations to one another and to the subject matter are subjects for consideration ” (Citing *Campbell v. Freeman*, 99 Cal., 516, 34 Pac., 113 ; *Peirce v. Robinson*, 13 Cal., 116 ; *Locke v. Moulton*, 96 Cal., 21, 30 Pac., 957 ; *Ross v. Bruisee*, 64 Cal., 245, 30 Pac., 811 ; *Taylor v. McLain*, 64 Cal., 513, 2 Pac., 399).

Bispham's Equity, 9th ed., sec. 7, expresses the idea in these words :

“ the decree can be so framed and moulded or its execution so controlled and suspended that the relative

duties and rights of the parties can be secured and enforced. This capacity of moulding the decree to suit the exact exigencies of the particular case is indeed one of the most striking advantages which the procedure in chancery enjoys over that at common law."

Without expressing the rule in words, the Supreme Court in the Northern Securities Case, 193 U. S., 197, at page 353, applied it to the facts in that case saying :

"It was said in the argument that the circumstances under which the Northern Securities Company obtained stock in the constituent companies imported simply the investment in the stock of other corporations—the purchase of that stock ; * * * This view is wholly fallacious and does not comport with the actual transaction. There was no actual investment in any substantial sense by the Northern Securities Company in the stock of the two constituent companies. If it was in form such a transaction, it was not in fact one of that kind."

and the Court, looking "through the form to the substances" held it was a combination in violation of the Sherman Act, and that parole evidence was admissible to show the true transaction.

To the same effect see *Wagg v. Herbert*, 92 Pac., 250, 264 ; *Sadler v. Taylor*, 38 S. E., 583, 590.

Applying the principles established by those cases to the case at bar, we have the form adopted, a deed from Mathews and Syme to the Arizona Copper Estate (rec., pp. 72, 73) and a reconveyance by the Arizona Copper Estate to Mathews and Syme (rec., pp. 77–80) with a proviso written into the printed blank used, as follows :—

"*Provided*, always that if said notes are paid according to their tenor and effect, then these presents shall become void and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect, * * *

It was expressly conceded that no payment was made on the notes (rec., p. 37). Consequently by its very terms the reconveyance remained "in full force and effect."

In *Bogk v. Gossert*, 149 U. S., 17, the Supreme Court (p. 28) cites the case of *Wallace v. Johnstone*, 129 U. S., 58, 61, 64, of which it says :

"The purpose of this case is that in the absence of proof of a debt or other explanatory testimony the parties will be held to intend exactly what they have said upon the face of the instruments."

This would seem to settle the matter against the appellant's contention upon the face of the instruments in the very form adopted ; but an examination of the evidence in the case shows that the transaction was such that the same result follows from a different view of the contract.

The evidence which is set out in the statement of facts clearly establishes that the transaction, no matter what form was given to it by the parties, was actually a conditional sale for \$100,000, and that no payment having been made the title remained in Mathews and Syme unaffected by the transaction.

This is what the Court below held, but whether considered as a conditional sale or a reconveyance subject to divestiture on payment of the price the result is the same the title remained in Mathews and Syme, no payment being made.

Another rule of construction applies here, that is, that where in a printed form written matter is inserted, the written portion prevails over the printed.

In the reconveyance from Arizona Copper Estate to Mathews and Syme, the proviso reading (rec., p. 79) :

"Provided always that if said notes are paid according to their tenor and effect then these presents shall become void and the estate hereby granted shall cease, determine and be void, otherwise to remain in full force and effect "

is inserted in writing.

This is inconsistent with the covenant printed in the form giving the parties of the second part the power to sell the premises (rec., p. 79).

In *Heyn v. N. Y. Life Ins. Co.*, 192 N. Y., 1, the Court said (p. 6) :

“ Section 20 together with the main portions of the contract is upon a printed blank furnished by the defendant, and if its provisions are doubtful, uncertain or repugnant to the written portions of the agreement, that which is written should control the interpretation of the instrument.”

The same principle was applied in *Fagan v. Ulrich*, 166 A. D., 342.

The fact that a form for a mortgage without bond, under the New York practice, was used by Mr. Mathews is immaterial. The evidence is complete that no indebtedness existed either before the execution of the papers, at the time of their execution, or after their execution from the Arizona Copper Estate to Mathews and Syme or either of them ; nor is there any evidence that a loan was ever discussed between them or that there was anything said about a mortgage, all of which are facts necessary to be shown to establish that the instrument (rec., pp. 77-80) from the Arizona Copper Estate to Mathews and Syme was a mortgage as claimed by appellant (*Conway's Executors v. Alexander*, *supra*, p. 240 ; *Bogk v. Gossert*, 149 U. S., 17, 29). Moreover the provision for defeasance is inserted in the blank form in writing (see original of Plaintiff's Exhibit “ C ” rec., pp. 77-80) and therefore this provision for defeasance overrides the printed covenant giving Mathews and Syme the power to sell (*Heyn v. New York Life Ins. Co.*, 192 N. Y. 1, 6 ; *Fagan v. Ulrich*, 166 App. Div. 342, 344). This principle is so well understood that it is not necessary to cite any other or further authority.

From the foregoing it is clear that this Court, sitting in equity, will look through the form to the substance and determine the case according to what the actual transaction was in order to carry out the true intent of the parties.

In doing this the Court must find that the Court below did not err in finding that the deed from Mathews and Syme to

to Arizona Copper Estate and the reconveyance by the latter to the former were to be construed as one instrument and constituted a conditional sale of the land therein referred to, or in not finding that such reconveyance was a mortgage.

This disposes of the first and second assignments of error of the appellant.

III.

The full legal title to the said land was at the time of the commencement of this action and is now in the plaintiffs.

The title to said land remained in Alexander F. Mathews and Samuel A. M. Syme notwithstanding the execution and delivery of the two instruments (rec., pp. 72-80).

Whether the Court agrees with the contention heretofore made in this Brief, that the transaction evidenced by said instrument was a conditional sale ; or whether it finds that Plaintiffs' Exhibit B is a deed and Plaintiffs' Exhibit C is a purchase money mortgage, the same result follows.

It is respectfully submitted that what has been said establishes that the transaction was a conditional sale, and in that event, the condition not having been performed, the title never passed. It is not understood that the Appellant's Brief suggests that title passed, if it be found that the transaction was a conditional sale.

A deed and a purchase money mortgage is construed as one instrument to such an extent as to prevent the title conveyed by the deed vesting in the grantee even for an instant of time so as to permit the dower right of the wife of the grantee to attach to the land.

If it be held that Plaintiffs' Exhibit B was a deed and Plaintiffs' Exhibit C a purchase money mortgage contemporaneously taken the superior title remained in Mathews and Syme, and could only be divested by payment of the price, which was not done.

In *Dicken v. Cruse*, 176 S. W., 655 (Tex. Civ. App., Apr. 7, 1915, rehearing denied April 29, 1915), the court said (p. 657):—

“ The deed, mortgage, notes and bill of sale were all executed by the same parties and simultaneously. The mortgage is based upon the notes and they are proven by the admissions of Gilder in his answer to the suit thereon by Minter to have been executed as a part of the consideration for the sale of the personality and realty under mortgage. All the instruments being parts of and in reference to the same subject-matter, the effect of the simultaneous execution of the same would be to constitute them but one act and to require them to be construed as but one and the same instrument (*Howard v. Davis*, 6 Tex., 181 ; *Dunlap v. Wright*, 11 Tex., 597).

* * * * *

there was an executory contract for the conveyance of the tract of land out of the Tatman league, the superior title remaining in Minter and his wife and which could be divested by Gilder or his vendees only by payment of the purchase price (*Masterson v. Cohen*, 46 Tex., 520 ; *Jackson v. Palmer*, 52 Tex., 427 ; *Webster v. Mann*, 52 Tex., 416 ; *Hale v. Baker*, 60 Tex., 217.)”

In *Woodward v. Ross*, 153 S. W. 158, the Court said :

“ Where a vendor's lien is expressly retained in the deed, or a cotemporaneous mortgage is given, the legal title remains with the vendor. * * * ”

In *De Steaguer v. Pittman*, 117 S. W. 481, the Court held that a deed of land reserving a vendor's lien to secure the deferred payments vests in the purchaser only an equity in the land and the superior legal title remains in the vendor, and the purchaser failing to pay the price does not acquire title.

In *Evans v. Ashe*, 108 S. W., 393, it was held that where the conveyance reserved a vendor's lien for the payment of the price, a written instrument was not required to defeat the grantee's rights on his failure to pay the price as agreed.

To the same effect see :

Anderson v. Silliman, 92 Tex., 560 ;
New Eng. L. & Tr. Co. v. Willis, 19 Tex., Civ.
 App., 128 ;
Efrom v. Burgower, 57 S. W., 306 ;
Lucey v. Smith, 111 S. W., 965 ;
Miller v. Linguist, 141 S. W., 170 ;
McKelvain v. Allen, 58 Tex., 383 ;
Dunlap's Admr. v. Wright, 11 Tex., 597 ;
Baker v. Ramey, 27 Tex., 59 ;
Baker v. Clipper, 26 Tex., 629 ;
Baker v. Compton, 52 Tex., 261 ;
Peters v. Clements, 46 Tex., 114 ;
Roosevelt v. Davis, 49 Tex., 261,
 176 S. W., 633 ;
Lundy v. Pierson, 67 Tex., 233 ;

From the foregoing it is submitted that even if it should be held that Mathews and Syme deeded the property to the Arizona Copper Estate and the Copper Estate contemporaneously gave a purchase money mortgage, nevertheless, the Copper Estate having admittedly failed to pay the price, the title remained in Mathews and Syme, and as stated in one of the cases cited no written instrument was required to defeat the title of the Arizona Copper Estate.¶

Syme and the representatives of Mathews conveyed the property to the plaintiffs (rec., pp. 67-70). The Court below did not err in holding that the full legal title to the land was in the plaintiffs, and that the Arizona Copper Estate acquired no interest in the land.

IV.

The instruments, Plaintiff's Exhibits B and C, constitute a cloud upon the plaintiffs' title, and the title should be quieted and the cloud removed.

If it is necessary to produce extrinsic evidence to show that a semblance of title, either legal or equitable, which, if

valid, would effect or encumber the title is invalid, there is a cloud created upon the title.

- Graves v. Ashburn*, 215 U. S., 331.
Ogden Co. v. Armstrong, 168 U. S., 224.
Rich v. Braxton, 158 U. S., No. 75.
Johnson v. Kramer, 203 F., 733, 742.
Accord v. West, etc. Corp., 156 F., 189, 998 ; aff'd,
 174 F. 119.
Thompson v. Pinnell, 237 Mo., 545 ; 141 S. W., 605.
Allott v. Am. S. Co., 237 Ill., 55 ; 86 N. E., 685.
Glos v. People, 259 Ill., 332, 342 ; 109 N. E., 763.
Parker v. Smith-Brent L. Co., 47 So., 580.
McArthur v. Griffith, 61 S. E., 519.

Here extrinsic evidence, at least to show that no payment was made, was required ; and hence the instruments created a cloud upon the plaintiff's title within the definitions given in the foregoing cases.

This being so, and it appearing that upon the facts the semblance of title in the Arizona Copper Estate was invalid, the Court below properly found the instruments to create a cloud upon the plaintiffs' title and barred the Arizona Copper Estate and its successors in interest from asserting any interest or title under the said deed and reconveyance.

This point, and the preceding point, dispose of the appellant's Fifth and Sixth assignments of error.

V.

The plaintiffs were not guilty of laches in bringing this action, nor are they barred by any Statute of Limitation from being entitled to the relief sought, that is, the quieting of title in them and the removal of the cloud.

It was stipulated by counsel that the land was segregated from the public domain by the filing of the plat of survey in December, 1914 (rec., p. 49), so that neither the plaintiffs nor the Arizona Copper Estate prior to that time

were entitled to possession, and the plaintiffs did not take possession until after the decision of the Supreme Court June 22, 1914, directing the filing of the Contzen survey to which the stipulation applies; and the Arizona Copper Estate never has had possession.

Moreover, this being an action to quiet title and remove cloud, was not barred by any statute of limitation.

In *Reich v. Cochran* (citing *Miner v. Beekman*, 50 N. Y., 337, 343), *supra*, at page 425, the Court said :

“ In that case Judge GROVER said, referring to a case where the mortgagor had continued in possession, that the right to maintain the action for the purpose of removing a cloud from title is a continuing right ‘that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist.’ ”

In *Woodward v. Ross*, 153 S. W., 158, the Court said :

“ Where a vendor’s lien is expressly retained in the deed or a contemporaneous mortgage is given, the legal title remains with the vendor and he may convey the land though the purchase money notes are barred by limitation. There is an unbroken line of authority to this effect beginning with *Howard v. Davis*, 6 Tex., 174, and going through numerous decisions down through *Atterbury v. Burnett*, 102 Tex., 118.”

Hence the Arizona Copper Estate in this case cannot object to the plaintiffs’ action on the ground that it is the mortgagor in the purchase money mortgage when, by reason of the statute of limitations, such mortgage is barred, and it does not offer to pay the debt secured thereby.

In *Ruggio v. Palmtag*, 155 Cal., 797, 801, it was held that a mortgagor’s assignee can not quiet title against a mortgagee in possession without paying the debt.

This disposes of the appellant’s Seventh and Eighth Assignments of error, and the foregoing points dispose of the 9th assignment of error—that is, that the Court erred in not dismissing the bill on the merits.

VI.

The so-called mortgage is not on its face a mortgage.

The paper (rec., pp. 77-80) conveys the property in the usual form of a deed without covenants and then after the habendum a recital is inserted that certain notes have been executed by the grantor which is followed by another habendum clause and then comes the written insertion of the proviso that if the notes are paid the conveyance becomes void which is followed by the printed covenants to pay and that the grantees may sell.

There is no statement preceding the conveying portion of the instrument of any indebtedness as is usual in a mortgage, nor is there any statement of an intention to secure any indebtedness. The recital of the execution of the notes is entirely consistent with the undisputed oral testimony that there was no debt, and that it was not intended that the Arizona Copper Estate should be indebted if the notes were not paid. The notes were executed merely as a convenient form of stating the instalments of the purchase money and the times of their payment and probably to give greater verisimilitude to the transaction as a sale and purchase money mortgage for the purpose of enabling Dorsey the better to carry out his scheme to raise money on the security of the property. In this view there is no inconsistency in the promise to pay, since it was anticipated that the purchaser expected and proposed to pay the purchase price. Nor is there any inconsistency in the covenant giving a power to sell in case of default since in the case if a conditional sale the vendor would have the power without any covenant of the vendee because the sale would be void. For similar reasons there is no significance to be attached to the fact that the stamps required for a mortgage are affixed to the paper, for this was necessary to carry out Dorsey's purpose of making it appear to any one to whom he applied for money that it was an ordinary sale with a purchase money mortgage back.

But the paper on its face is plainly not a mortgage, what-

ever it may be, since it is a conveyance to third persons, not to the payees of the notes. The distinction between a mortgage and a deed of trust is stated clearly in Words and Phrases, v. 5, p. 4602, and cases cited. Under those cases this paper is a deed of trust rather than a mortgage, if it is either. If it be held to be a deed of trust Syme, as surviving trustee, exercised the power of sale when he joined in the deed to Watts and Davis since under the Arizona statutes at that time no notice was required to be given of a sale. The sale being made without application to the court or any court proceedings the statute of limitations did not apply.

Grant v. Burr, 54 Cal., 298.

Travelli v. Bowman, 150 Cal., 537, 590.

Rowe v. Mulvane, 139 Pac., 1041.

Certainly whether a mortgage or deed of trust the debtor cannot have his title quieted without paying the debt.

Raggio v. Palmtag, 155 Cal., 797, 801.

Puckhaber v. Henry, 152 Cal., 419, 423.

Marshutz v. Seltzer, 5 Atl., 140, 145.

No notice of sale required, may be private, not 2358-2359. Stats. Arizona, 1887. In force 1899, at made. No notice of sale, and may be private. Stat. It was not until 1913, power was only to be exercised. Sale in this case was made in 1907. As neither instrument required notice, advertisement or public sale, private notice was valid. 27 Cyc. 1466.

AMM. NOV.

Finally, because it would be monstrous if an equity court by its decree should give this property to the Arizona Copper Estate or its assignee when it never paid one cent of the hundred thousand dollars it agreed to pay.

In *Dunlap's Adm'r. v. Wright*, 92 Am. Dec., 506, 11 Tex., 597, the action was in ejectment to try title by the mortgagor in a purchase money mortgage; and the court said (p. 604):

“The effect of a judgment in this case would be to eject the original owners out of a possession held by them for many years and to admit to the possession

the vendee who by his acts has evinced an intention to abandon the contract, who has not paid or offered to pay a farthing of the purchase money, who pledged the land at the instant of the purchase or in the language of the cases conditionally revested the fee; this defaulting vendee being inducted into possession the vendor is left without a shadow of redress as the bond and mortgage have been barred by limitation. Such consequences are too monstrous to be tolerated. They are not sanctioned by any principle of law or justice."

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Marshutz v. Seltzer, 5 Atl., 140, 145.

VII.

The decree of the Court below should be affirmed.

Finally, because it would be monstrous if an equity court by its decree should give this property to the Arizona Copper Estate or its assignee when it never paid one cent of the hundred thousand dollars it agreed to pay.

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For the Ninth Circuit

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Appellant,

vs.

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DABNEY C. T. DAVIS, Jr.

Appellees.

Additional Brief for Appellees

WATTS AND DAVIS

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Filed

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Clerk.

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ADDITIONAL BRIEF FOR APPELLEES.

HARTWELL P. HEATH,
HERBERT NOBLE,
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Attorneys for Watts and Davis.

STATEMENT OF FACTS.

Alexander F. Mathews and S. A. M. Syme were the owners of a tract of land in Arizona, of approximately one hundred thousand acres, known as Baca Float No. 3. They wanted to sell the land. Through Col. Boyce, acting as a broker, Syme and Senator Dorsey, a prospective purchaser, met. They first talked about an option, and some three months or so prior to August, 1899, a paper was signed by Syme, in which he agreed to sell the Float to Dorsey for \$125,000. (Abstract, Folio 37.)

This agreement came to nothing and was cancelled. Later, negotiations were again taken up between Syme and Dorsey. Dorsey wanted a deed to the property "because he said that he thought he could use that better." (Abstract, Folio 30). In his affidavit, Dorsey says: "It was finally agreed that the purchase price of the property should be \$100,000, to be paid in various sums and at various times, running over about two years. My plan was to form a corporation to which the property could be deeded and which could then raise on the property a sum sufficient to pay the purchase price. It was therefore arranged that the property should be deeded to the corporation, but, as the sale was not to be made unless and until the price was paid, it was arranged that the corporation would reconvey the property to the then owners, subject to divestiture if the purchase price was paid as agreed." (Abstract, Folio 72). "This form was adopted as the simplest and the one which would enable the corporation to handle the property easiest in raising the money required. There was never any intention that in case the corporation should not be able to raise the money, it should be indebted to those named in the amount of the notes or in any amount." (Abstract, Folio 73). Syme says, as before stated, that Dorsey wanted a deed because he said he thought that he could use that better. "He wanted to give me a deed in exchange at the same time." Syme says further: "Dorsey wanted the property. I told him that I would sell him that property for \$100,000. He was to pay me \$5,000 personally, in cash; and \$100,000 for the property." "Dorsey said he would agree to this if I would give him

a deed. I objected to the deed to some extent and then he explained to me that the deed would be in effect of such a character that the property would be held by us and the title in us, and not go out of us, and if the notes weren't paid the whole property would be in us still, and everything would be void, notes and all." (Abstract, Folio 30). Dorsey says: (Abstract, Folio 73) "my understanding has always been and is now that the transaction, on account of the failure of the Arizona Copper Estate to make the payments agreed on, was as though it had never taken place, and that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation, or of the Arizona Copper Estate itself." Syme again stated: "If the notes weren't paid, all the notes weren't paid, the property was to remain in us and the notes were to become void and the whole thing wiped out." (Abstract, Folio 31). "The \$5,000 was not to be a part of the purchase price but was to come to me personally. He was to pay me \$5,000 for giving him an option for a certain period." "My dealings were entirely with Senator Dorsey and I made my agreement with Senator Dorsey." (Abstract, Folio 32).

The agreement having been made, Mathews and Syme went to New York, August 3, 1899, and there met Dorsey, Philip K. Reynolds, and James Simmonds. Here, the terms of the agreement were restated. "In substance it was said amongst all of us, you know, that if all the notes weren't paid everything became void, the notes and all, and the thing passed off and we stood the original

grantors, Mathews and myself, holding the title.” (Abstract, Folio 32). A deed was then and there executed by Mathews and Syme to the Copper Estate, plaintiff’s Exhibit “B”, and simultaneously plaintiffs’ Exhibit “C”, whether it be mortgage or reconveyance, was executed and delivered to the grantors. Notes aggregating \$100,000 were signed by the Arizona Copper Estate. Of these notes, \$20,000 were delivered to Mathews as trustee, \$26,758 to Mathews personally, Colonel Boyce received \$24,121 of the notes, and Syme \$29,121. The notes given to Boyce were a commission. “Those delivered to Colonel Boyce were given simply as a commission for making a sale of this property. If there was a sale he got that much commission out of the sale of the moneys we received. That is all the interest he had in it. It was only a commission; if the notes weren’t paid, Boyce was not to get anything.” (Abstract, Folio 35). The \$5,000 was paid by Dorsey. (Abstract, Folio 37). This \$5,000 was paid, not for the property, but for an option or deed for a certain period. (Abstract, Folio 31). Syme gave \$1,000 of this amount to Mathews, and \$2,000 to Boyce, and took in exchange therefor a larger amount of notes. That is to say, that \$1,000 from Mathews and \$2,000 from Boyce, that they would have received in notes was transferred to Syme, so that he received more in notes to the extent of \$3,000 than he otherwise would have received. (Abstract, Folio 39). Syme considered that the price of the property, \$100,000, was a good price for it. (Abstract, Folio 39). When Syme, Mathews and Dorsey were leaving the office in New York, it was stated by Mathews, in the presence of Dorsey, that

if the notes were not paid, the whole thing amounted to nothing and it stood just as it did before. That the whole transaction would be null and void, including the notes, and that the title would be in Mathews and Syme. (Abstract, Folio 40). There was no loaning or borrowing of money, and on the day the papers were drawn and delivered, August 3, '99, neither Dorsey nor the Copper Estate owed any money to Mathews or Syme. (Abstract, Folio 41.) Syme states that he considered the paper in the nature of an option and that he and Mathews conveyed the property to the Copper Estate, and that it reconveyed it to them, so that they could get control of the property if the notes were not paid as they already had the property, that is, the title of the property. "The title was in us," Syme says, "but the control for the time being limited by the notes to me and Mathews, was out of us." "When I use the words 'come back' I mean control. There is a difference between coming back and control. Do you understand me? They had the control during the limit of the notes." If the notes were not paid "then the control came back and Dorsey had nothing more to do with the property, and everything was void, notes and all." (Abstract, Folios 42-43). Dorsey says, as already quoted: "my understanding has always been and is now that the transaction, on account of the failure of the Arizona Copper Estate to make the payments agreed on, was as though it had never taken place, and that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation or of the Arizona Copper Estate itself." (Abstract, Folio 73).

THE TRANSACTION OF AUGUST 3, 1899, BETWEEN MATHEWS AND SYME AND THE ARIZONA COPPER ESTATE CONSTITUTED IN REALITY AN OPTION TO SELL BACA FLOAT NO. 3 FOR \$100,000, AND THE \$5,000 PAID WAS FOR THE OBTAINING AND GRANTING OF THE OPTION. THE TWO PAPERS EXECUTED, THE DEED AND THE MORTGAGE OR RECONVEYANCE, WERE IN REALITY NOT A DEED OR A MORTGAGE BUT WERE THE FORM ADOPTED BY THE PARTIES IN CARRYING OUT THEIR OPTION AGREEMENT, BOTH DEED, MORTGAGE AND NOTES, ALL TO BECOME VOID IF THE PURCHASE PRICE WAS NOT PAID.

First of all and underneath all, the parties had an agreement. That agreement was that Syme would grant an option or obtain an option, to be in the form of a deed, and was to receive for this the sum of \$5,000. That the purchase price of the property should be \$100,000, none of which was to be paid, but all of which was to be evidenced by notes, extending over a certain period of time. That Dorsey, or the Copper Estate, should reconvey the title, and that, if the purchase money was not paid, the entire transaction was to be considered of no force or effect and as if it had never been made, and the parties were to remain as they were at the beginning of the negotiations. There never was to be a debt, the Copper Estate was not to be bound to pay the \$100,000, but if it didn't pay the notes, the notes were to be void. This was the agreement, and

this is the base and foundation upon which the rights and equities of the parties must be determined.

The transaction has all of the earmarks of an option. A price was to be paid to Syme for obtaining or bringing about the deal. Boyce was to obtain and have a commission to be paid if a sale was made. Neither Dorsey nor the Copper Estate was to be bound to purchase the property nor bound to pay the notes or any sum whatever. If the purchase price was not paid at the time mentioned, the entire transaction was to end, and the parties to owe each other nothing and to be as they originally were. The deed was actually not a deed nor was the paper back a mortgage or a re-conveyance. These papers were simply the vehicles used by the parties to carry out the option. Dorsey wanted the transaction in this form as it would best enable him to raise money and to dispose of the Float; but there never was any intention that the deed or the reconveyance should have any existence separate from or independent of the contract, but that they were subsidiary to the contract and were to be controlled entirely by it. There could not be a mortgage because there was no debt. It would have been impossible for Syme and Mathews to have foreclosed the mortgage and sued on the notes because the contract was that if the notes were not paid, they were to be void. There being no debt, there could be no foreclosure. Had an attempt been made to have foreclosed the so-called mortgage, undoubtedly Dorsey would have stated, as he has stated in his affidavit in this case, that there was no debt and Mathews and Syme would have

been compelled to have admitted it, and therefore there could have been no foreclosure.

The deed, then, and the mortgage or reconveyance, are in equity not a deed nor a mortgage. It was never intended that they should carry title or reconvey title except in the event of a sale and the payment of the money. As the money was not paid, they never were a deed or a mortgage, and in equity the title was in and always has been in Mathews and Syme, and their grantees.

THE ADMISSION OF PAROL EVIDENCE TO IMPEACH AN INSTRUMENT IN WRITING TO SHOW THAT IT IS NOT IN REALITY WHAT IT APPEARS TO BE AND TO SHOW THE OBJECTS AND PURPOSES THE PARTIES HAD IN EXECUTING IT IS NOT A VIOLATION OF THE PAROL EVIDENCE RULE.

“A court of equity, we there state, looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import but must speak for itself. The rule does not forbid going into the object of the parties

in executing and receiving an instrument. Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice." Mr. Justice Field. *Brick v. Brick*, 98 U. S. 516. *Peugh v. Davis* 96 U. S. 336.

Also see *Southern Street Railway Co. v. Metropole Shoe Co.*, Court of Appeals of Maryland, 46 Atl. 573, where a large number of authorities are cited and quoted, and where the language of Mr. Justice Harlan, in *Burke v. Dulaney*, 153 U. S. 234, is quoted as follows: "The rule that excludes parol evidence in contradiction of a written agreement, presupposes the existence in fact of such agreement at the time suit is brought. But the rule has no application if the writing was not delivered as a present contract and parol evidence was admissible to show that there never was any concluded, binding contract, entitling the plaintiff, who claimed the benefit of it, to enforce its stipulations."

ANOTHER VIEW STATED BY SEVERAL COURTS IS, THAT WHEN A QUESTION ARISES WHETHER A TRANSACTION IS A CONDITIONAL SALE OR A MORTGAGE THAT A COURT OF EQUITY WILL LOOK AT THE ENTIRE TRANSACTION, ORAL AS WELL AS WRITTEN, AND FROM THE ENTIRE TRANSACTION GATHER THE IN-

TENT OF THE PARTIES, AND THIS INTENT, WHEN ASCERTAINED, WILL CONTROL THE ENTIRE TRANSACTION.

The supreme Court of West Virginia, in *Sadler v. Butler*, 38 S. E., 583, says: "The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances attending the transaction and the conduct of the parties, as well as from the face of the written contract." Jones on Mortgages, 258: "If, upon the whole in this action, it shall appear that a security for money was intended, it is a mortgage whatever be its terms, and if, on the other hand, it shall upon the whole appear that it was a conditional sale, the performance of the condition punctually at the time may not be dispensed with." In this case the court held that the test is whether or not a debt existed. If a debt existed, the instrument would be called a mortgage; if it did not exist, it would be a conditional sale.

In *Bigler v. Jack*, Supreme Court of Iowa, 87 N. W. 700, the court quotes from *Pomeroy's Equity*, Sec. 1195, and say: "Whether any particular transaction does thus amount to a mortgage or to a sale with a contract of repurchase must to a large extent depend upon its own circumstances, for the question finally turns in all cases upon the real intention of the parties as shown upon the face of the writings, or as disclosed by extrinsic evidence."

Attention is also called to the case of *Slutz v. Dusen-*

berg, 28 Ohio St. 371, where the court say that the inquiry must be whether the contract is a security for the payment of money or not and whether the creditor would have a remedy against the person of the debtor. In this case many authorities are cited.

In the case at Bar, there could not be a mortgage because there never was at any time a debt. The evidence that there was no debt is uncontradicted and is testified to by the only two living persons who were present and knew about the transaction, Syme and Dorsey. The reconveyance back, therefore, could not, by any possibility, be a mortgage, and it should be given the effect that the parties intended it to have, namely, that, taken together with the conveyance to the Copper Estate, of a conditional sale.

THE EQUITIES IN THIS CASE ARE VERY POWERFUL UPON THE SIDE OF WATTS AND DAVIS AND A GREAT INJUSTICE AND WRONG WOULD BE DONE IF THE CONTENTIONS OF THE APPELLANTS SHOULD BE UPHELD.

The Arizona Copper Estate has never paid one dollar for the property. It has never been in possession of the property. From 1899, up until 1915, it never made any claim to have any interest whatever in the property. The Arizona Copper Estate has really never, at any time, made any claim to the property and in fact is not now making any claim to the property. Had it not been for the activity of the Santa Cruz Development Company, the defendant in another action, we think it is very clear

that the Arizona Copper Estate would never have answered in this lawsuit or made any pretension or claim to ownership.

It appears that in June, 1914, Senator Dorsey, the person with whom the contract was made, and the president of the Arizona Copper Estate, made the statement we have already quoted, to the effect that there never was a debt and that the whole transaction was as if it had never existed, by reason of the non-payment of the money. In the face of this affidavit, therefore, we think it proper to say that the Arizona Copper Estate, as such, would never have set up or claimed any interest whatever in the land. But it appears from a statement of Mr. Brevillier, Solicitor for the Santa Cruz Development Company, and found in folios 48-49 of Abstract of Record, that after Dorsey had made his affidavit, Dr. Root, acting for Mr. Brevillier, proceeded to Los Angeles to see Mr. Dorsey and that thereafter Mr. Vroom, president of the Santa Cruz Development Company, who is well acquainted with Senator Dorsey, wrote him and asked him if he, Dorsey, would make a deed of the land, and that after some negotiations the Copper Estate, by Dorsey as president, made the deed. It does not even appear that the Copper Estate employed Mr. Hill in this case; but it does appear that Mr. Brevillier, attorney for the Santa Cruz Development Company, asked Mr. Hill if he would appear in this case, and that Brevillier told him he would get authority from Dorsey, and that subsequently Dorsey did send the authorization such as it was to Mr. Hill. Mr. Brevillier states that, as a matter of

business policy, he thought it advisable to get the deed from the Copper Estate. So that, as a matter of fact, the Copper Estate has never answered in this case and never appeared in it; but that the Santa Cruz Development Company, has used it as a cat's paw as it were for its own benefit in the other lawsuit in which it is interested.

It would indeed be monstrous, in view of the uncontradicted facts in this case, that a sale was never intended unless the purchase money was paid, that there never was intended to be a conveyance of title unless the purchase money was paid, that there never was a debt or claim of debt, that there never was any obligation on the part of the Copper Estate or any of its officers to pay, that the agreement was that if the money was not paid, the whole transaction was to be naught, it would indeed, we say, be monstrous, under such conditions, to permit the appellant now, who has never paid one dollar to the owners of the land, to obtain this land, under the mere technicality that the real facts of the transaction could not be shown.

IF, FOR ANY REASON, IT SHOULD BE HELD THAT THE SO-CALLED MORTGAGE IS SUCH, THEN WE CALL ATTENTION TO THE FACT THAT IT CONTAINS A POWER OF SALE.

Under no circumstance could the instrument be technically a mortgage or technically a deed of trust; but it is in reality a mortgage with power of sale, partaking of the nature of both. The notes were given to Boyce, Syme and Mathews, and Mathews, Trustee, who

were all interested in making a sale; but the mortgage was given to Mathews and Syme alone, and to them was given the power of sale. There is no provision in the mortgage for notice in the event of a sale or for any proceedings, the words being merely that the sale shall be according to law. As the property is situated in Arizona, the laws of Arizona must control. At the time the mortgage was given, the laws of Arizona did not require that any notice be given in the event of a sale under a power, and did not require that the sale be public. This being true,, it lay in the power of the mortgagees to sell at private sale and without notice. Also at the time of the execution of the paper, there was no redemption in Arizona from a sale under a power. Mathews and Syme, therefore, had the right, even treating the paper as a mortgage, to sell the property at any time that the notes were not paid, at private sale, without notice. Mathews died in 1907, and therefore the right to sell was in Syme. In this year and after Mathews death, Syme and the heirs of Mathews sold the property to the present appellees, Watts and Davis, in this action. It is true that Syme and the heirs had no intention when they sold of selling under the mortgage because in reality there was no mortgage; but, if it should be held that the paper was a mortgage, then, regardless of intent, the property was actually sold by a person having a right to sell, and the title passed.

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No. 2663

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

ARIZONA COPPER ESTATE,

Appellant,

VS.

CORNELIUS C. WATTS and DABNEY C. T.

DAVIS, JR.,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

J. N. GILLETT,

F. A. CUTLER,

BEN C. HILL,

G. H. BREVILLIER,

*Counsel for Appellant
and Petitioner.*

Filed this.....day of January, 1917.

Filed

FRANK D. MONCKTON, Clerk.

JAN 3 - 1917

By.....Deputy Clerk.

F. D. Monckton,
Clerk.

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APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes appellant by its counsel, and applies for a rehearing and a reconsideration by the Court of its opinion and the judgment and decree thereon, and assigns the following reasons therefor:

We appreciate the fact that the time of this Court is fully occupied in its consideration of pending cases before it and it would be loath to reopen a case unless good and sufficient reasons should appear

therefor. We also appreciate however that the facts as found to exist in a given case should be fully understood. We, therefore, ask the indulgence of this Court while we give a brief recital of the facts established by the evidence herein and which do not appear in the opinion. We respectfully submit that if these facts do appear in the record, they do not support the language contained in the opinion, "The contention of appellant if sustained here, would result in a monstrous fraud". Precisely the same state of facts have been presented to Federal Courts in other cases, including the United States Supreme Court, and the view adopted by those Courts is at variance with the one expressed in the opinion herein. We earnestly urge this Court to give the following petition the same careful and respectful consideration with which it was prepared.

In the year 1899, or fifteen years prior to the filing of the bill of complaint in this action, three men of mature years and of unusual experience in the business, commercial and public affairs of life, entered into negotiations concerning the sale and purchase of certain property. After a fair and full discussion of all the details of the subject-matter, one of the parties, the president of a bank, lawyer and real estate speculator, who had participated in all of the negotiations as a vendor, was delegated to prepare necessary written instruments expressive of the final agreement of the parties. These instruments were duly executed

and made a matter of public record. A partial consideration of \$5,000 cash was paid to the vendors and \$100,000 in notes secured by a mortgage on the property was executed and delivered to them. The present action is not one to reform or rescind; there is no charge here of fraud, mistake or omission. It is not claimed that the instruments upon their face are vague, uncertain or ambiguous or differ in any respect from what the parties executing the same, styled and titled them when prepared and recorded. But, after fifteen years have passed since their execution, on the recollection of one of the actors (Syme) who committed the preparation of the legal papers to his associates (Mathews and Dorsey) and on the *ex parte* affidavit of one of the three (Dorsey), which affidavit was taken beyond the jurisdiction of the Court and without any opportunity being afforded for cross-examination and whose admission in evidence violates every rule of law, the lower Court finds that the instruments in question are not what they purport to be upon their face, but are something which the frail memory or imaginations of ancient witnesses desire them to be.

The application of the rule excluding parol evidence is promptly invoked by courts when they are asked to accept opinions and interpretations based upon ancient conversations and negotiations which confessedly became merged in a written instrument. Plaintiff's case consists of the deposition of Col. Syme taken in Washington, D. C., and the *ex parte*

affidavit of Senator Dorsey taken at Los Angeles without notice. The evidence of Col. Syme appearing in the abstract is in narrative form. It really consisted of a mere acquiescence to an agreement contained in a series of questions addressed to him by the attorney for plaintiff, of which the following is a sample (quoting from page 16 of the evidence):

“Q. So, then, if I understand you, your proposal to Dorsey was that if he would pay you \$5,000 personally, you would procure deeds to be executed to him or his nominee for the purchase price of \$100,000, under an agreement that if the property was not paid for the title to it was to be in you and Captain Mathews. Is that substantially correct?

A. That is my understanding, perfectly, about it.”

The *ex parte* affidavit of Senator Dorsey amounts to nothing more than mere conclusions or opinions of his regarding the nature and effect of the transaction.

The rule was succinctly stated by the Supreme Court of the State of California as follows:

“The uncertain statements of Carmichael (here Syme and Dorsey) made years after the event under examination should not be permitted to prevail against the formal written declaration of the parties made at the time of the transaction and as a part of it.”

Smith v. Goethe et al., 159 Cal. 628.

And again:

“The rule is well established that oral testimony in contradiction of the plain terms of

a written instrument or of written admissions should be clear, full and precise and that the weight to be given to any such testimony diminishes with its distance from the date of the instruments which it purports to contradict or overcome.”

In re Irvine, 102 Cal. 606.

It must be remembered that the instruments in question were prepared by the vendors, ~~the then owners~~ of the legal title (whose oral testimony is now relied upon to contradict their terms), and the recitals of said instruments are to be treated as an admission or declaration against interest and are in direct contradiction to their present testimony. Therefore, the Court is not confronted by that clear, full and precise character of oral testimony that is uniformly required by courts when they are called upon to overturn and destroy the plain terms of a written instrument.

There cannot be any question that the deed was intended to convey the title in fee ~~from the then owners~~ to the defendant and that a return mortgage was accepted as security for the promissory notes executed in payment of the property. The property had no real market value. The title became involved in doubt and the holders of the mortgage and notes deemed that the security was not sufficient to warrant them commencing foreclosure proceedings. In 1907 the present plaintiffs, attorneys at law, took a chance, in the vernacular of the street, by accepting a deed without any consideration being paid therefor, and eight years later instituted the pres-

ent action, when they thought the property had assumed some value. We are unable to see where any great fraud was perpetrated against the plaintiffs in this action, who never paid a dollar for the property.

The opinion herein recites “the contention of appellant if sustained here would result in a monstrous fraud”. And again, “Every consideration of justice and equity requires that the real intention of the parties be given effect”. In other words, at this late day this Court, in the absence of any evidence of fraud, mistake, undue influence or omission in the preparation and execution of the papers, adopts an interpretation contrary to the express terms of the instruments based upon the recollections of parts of conversations that occurred between the parties fifteen years ago. If the parties prepared these instruments with knowledge of the full meaning and import of the covenants now sought to be corrected, then according to the present contention they did so in reliance upon an assurance or agreement contrary to the import of the terms employed that it was mutually understood that the instruments on their face did not mean what they said.

As was said in the case of *Simpson v. U. S.*, 172 U. S. 372, 379 (opinion by Chief Justice White):

“The written contract merged all previous negotiations and it is presumed in law to express the final understanding of the parties. *If the contract did not express the true agreement it was the claimant’s folly to have signed it.*

The court cannot be governed by any such outside consideration.”

The same doctrine was announced in the case of *Great Western Manufacturing Co. v. Adams*, 176 Fed Rep. 326:

“On this state of facts we think there is no equity in the present bill. If an injustice was done, it was invited by the complainant. Neither mistake, fraud nor accident brought it about. * * * Courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection.”

In those cases as in this, the parties were neither laymen, women nor children, nor persons between whom confidential relations existed, but they were men of affairs, lawyers and business men who, when they prepared instruments in writing and attached their names to the same and filed them for public record, presumably knew what they were doing and if they were content to permit these instruments to remain of record for a period of fifteen years, then because of some change in the status of the property or of the persons interested, they should not be permitted to vary or alter the terms of written instruments as equity aids the vigilant and not those who sleep on their rights.

There is no evidence that a monstrous or any fraud was perpetrated fifteen years ago when these instruments were executed and the vendors were

contented with the \$5,000 cash payment which they have retained, and were satisfied with a return mortgage on the property, the foreclosure of which they did not consider worth taking advantage of. If this opinion stands there is no such thing as security of title derived from instruments of public record which on their face are presumed to speak the truth and whose verity can only be impeached by appropriate actions instituted in our courts, supported by competent evidence.

In our briefs in this Court, we contended that certain well settled rules of evidence were violated and specified as follows:

1. *That although parol evidence is admissible to show that an absolute deed was intended as a mortgage such evidence is not admissible to show that a mortgage was intended as a deed.*

2. *That parol evidence is not admissible to show that an instrument on its face a mortgage was intended as anything but a mortgage.*

The three cases cited in the opinion herein were all actions to declare absolute deeds to be mortgages, and the cited text book references are expressly limited by their authors to actions to declare absolute deeds to be mortgages.

The record discloses no reason why established and uniform rules of law and equity should be swept aside and that which must be conceded to be a mortgage, transformed into something radically different from a mortgage, in order to

circumvent the statutes of limitation and the doctrine of laches.

The decision of this Court amounts simply to this; That sixteen years after the closing of a deed and purchase money mortgage transaction, and about ten years after the barring of the notes and mortgage by limitation, the testimony of an interested witness will be accepted and all judicial precedents defied, to allow representatives of the mortgagees to accomplish a daring and unprecedented perversion of the legal effect of the papers in order to defeat the statutes of limitation.

The fact that an unusually capable mortgagee personally prepared the papers and afterwards voluntarily declared the transaction to be just what they show it was, makes the decision of this Court worthy of review.

Argument.

PAROL EVIDENCE IS NOT ADMISSIBLE IN EQUITY TO SHOW THAT A MORTGAGE WAS INTENDED AS A DEED, EXCEPT WHERE RELIEF IS DULY AND SEASONABLY SOUGHT FOR MISTAKE OR FRAUD; NOR HAS A COURT OF EQUITY JURISDICTION TO REMEDY SUPPOSED HARDSHIP BY DISREGARDING THE FUNDAMENTALS OF EQUITY JURISPRUDENCE.

We have been unable to find a single authority that parol evidence is admissible (except in an action to cancel or reform) to show that a mort-

gage was intended or should be construed as anything but a mortgage.

On the contrary, all the authorities agree that parol evidence is not admissible, either in equity or at law, to show that a mortgage was intended as anything but a mortgage, although the same authorities freely admit that parol evidence is admissible to prove that a deed was intended as a mortgage.

We respectfully refer the Court to the following cases and authorities, *each directly in point*, as supporting our contention:

Jones on Mortgages (7th Ed.) Sec. 277, pp. 363, 364

Jones on Evidence (Handbook) Sec. 499

Jones Commentaries on Evidence, Sec. 499

17 Cyc. 626

27 Cyc. 1023

20 A. & E. Ency. Law (2nd Ed.) 951

Devlin on Deeds (3rd Ed.) Sec. 1144

8 Ency. Evidence, 699, 700, 701

10 Ruling Case Law, 1023, 1024

Ferguson v. Miller, 4 Calif. 97

Goon Gan v. Richardson, 47 Pac. 762; 16 Wash. 373

Fowler v. Pendleton, 121 Md. 297, 302; 88 Atl. 124

Gassert v. Bogk, 19 Pac. 281, 285; 7 Mont. 585

Kunkle v. Wolfersberger, 6 Watts (Pa.) 126, 130; Gibson, C. J.

Brown v. Nickle, 6 Pa. 390, 391
Reitenbaugh v. Ludwick, 31 Pa. 131, 138
Woods v. Wallace, 22 Pa. 171, 176, 177
Snyder v. Griswold, 37 Ill. 216, 223
Johnson v. Prosperity L & B Ass'n, 94 Ill.
 App. 260
Voss v. Eller, 109 Ind. 260, 263; 10 N. E. 74
Proctor v. Cole, 66 Ind. 576
Wing v. Cooper, 37 Vt. 169, 183
Eckford v. Berry, 87 Tex. 415; 28 S. W. 937
Dunham v. McNatt, 39 S. W. 1016; 15 Tex.
 C. A. 552 (writ of error denied)
Adams v. Batemen, 29 S. W. 1124; Tex. C. A.

See also as to non-admissibility of surrounding circumstances, contemporaneous oral agreements or any parol or extrinsic evidence whatever.

Dean v. Nelson, 10 Wall. 158, 171
Veve v. Sanchez, 226 U. S. 234, 241
Hendricks v. Webster, 159 Fed. 927, 929
Shea v. Leisy, 85 Fed. 243

The reason why parol evidence is not admissible to convert a mortgage into a deed is clearly stated in *Jones on Mortgages* (7th Ed.) Sec. 277.

The parol evidence rule is the same in equity as at law.

Spriggs v. Bank, 14 Pet. 201, 206
Forsythe v. Kimball, 91 U. S. 291

The rules of evidence are the same in courts of equity as at law.

Bispham's Equity Jurisprudence (7th Ed.)
 Sec. 9

16 Cyc. 138

Greenleaf on Evidence (15th Ed.) Sec. 250

Whitehouse's Equity Practice, Vol. 1, p. 561

A court of equity is controlled by fixed rules and principles; mere hardship or moral right does not confer jurisdiction or warrant its exercise (5 *Ency. U. S. Sup. Ct. Rep.* 834 and cases cited).

As Chief Justice White so forcefully said in *Simpson v. United States*, 172 U. S. 372, 379:

“The rule by which parties to a written contract are bound by its terms, and which holds that they cannot be heard to vary by parol its express and unambiguous stipulations, or impair the obligations which the contract engenders by reference to the negotiations which preceded the making of the contract, or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement. The principle was clearly announced in *Brawley v. United States*, 96 U. S. 108, 173, where it was said: ‘All this is irrelevant matter. The written contract merged all previous negotiations, and it is presumed in law to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant’s folly to have signed it. The Court cannot be governed by any such outside considerations. Previous and contemporaneous transactions and facts may be very properly taken into consideration to ascertain the subject matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used.’”

The parol evidence rule is a doctrine of substantive law and courts are forbidden to heed such evidence or any kind of extrinsic evidence, even if it were received without objection. See our main brief, page 30;

Chamberlayne on Evidence, Vol. 5, p. 4912
et seq.

Equity follows the law. This is one of the cardinal maxims of equity.

“Wherever the rights or the situation of the parties are clearly defined, and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *aequitas sequitur legem* is strictly applicable.”

Magniac v. Thomson, 15 How. 281, 299

Hedges v. Dixon County, 150 U. S. 182, 192.

“Equity will not give a remedy in direct contravention if a positive rule of law. * * * This rule is recognized to the fullest extent in the equity jurisprudence of the United States. If a transaction is condemned under the force of legal rules, it cannot receive a more favorable consideration in a court of equity, on account of any hardship to particular parties; and legal rights acquired by the prosecution of a lawful demand in a lawful way will not be disturbed by the Chancellor.”

Bispham's Equity Jurisprudence (7th Ed.)

Sec. 37

King v. Hamilton, 4 Pet. 311, 328.

It is well settled that a misrepresentation or misunderstanding of the law will not vitiate a

contract where there is no misunderstanding of the facts (*Upton v. Tribilcock*, 91 U. S. 45, 50).

“The rule that a mistake of law does not avail prevails in equity as well as at common law.”

Upton v. Tribilcock, 91 U. S. 45, 50

Utermehle v. Normant, 197 U. S. 40, 56.

Captain Mathews, one of the mortgagees, drew the papers. He was then a lawyer, bank president and real estate operator. It is inconceivable that if only an option was intended, he would have drawn an absolute deed, with a concurrent purchase money mortgage and promissory notes, stamp the deed and the mortgage with the proper war stamps, and then promptly record the deed and the mortgage. In 1901, Captain Mathews and the lawyer-son of the other mortgagee formally admitted that in 1899 they had “sold” the property, taking notes therefor, “secured by a mortgage” (Rec. p. 59). Under what theory does the Court disregard such evidence and even fail to mention it in its opinion?

The doctrine of “once a mortgage, always a mortgage”, applies if ever it does or can apply to any transaction (*Dean v. Nelson*, 1 Wall. 158, 171; see also page 15 of our main brief).

From the maturity of the notes in 1901 up to 1914, neither the mortgagees, their numerous attorneys, nor Watts and Davis (both lawyers) made any attempt to foreclose their mortgage, to clear the record or take possession of the land. Watts

and Davis did not acquire their interest until after the notes and mortgage had been barred by limitation.

“The courts of equity will not relieve parties from the consequences of their own folly or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection.”

Great Western Mfg. Co. v. Adams, 176 Fed. 325, 327.

Nowhere is the justice of an adherence to the parol evidence rule more apparent than in this case. So far as known Col. Syme is the only living participant of the transaction of August, 1899. Senator Dorsey was at the time of the trial in a hospital in Los Angeles and has since died. Why draw papers if they can be disregarded in the remote future as easily as in this case?

ANALYSIS OF THE OPINION.

Appellant never admitted the truth of Col. Syme's testimony. Had appellant offered any evidence in rebuttal the Syme testimony would have become competent.

The statement of facts is predicated entirely upon incompetent parol testimony and the Dorsey statement, both of which when read by lawyers mean only a purchase money mortgage transaction.

The testimony of Col. Syme is based entirely on his understanding or misunderstanding of the

legal effect of the defeasance clause in the mortgage (Rec. pp. 44, 47, 48). It is a matter of common knowledge that parties to a mortgage transaction often believe that if the notes are not paid at maturity, the property is irredeemably lost, and “everything will be null and void, notes and all”. The defeasance clause confuses them.

There is not a scintilla of evidence that there was any mistake in the preparation of the papers. In fact, Col. Syme said that the mortgage expressed the transaction as he understood it (Rec. p. 48).

This Court has simply chosen to accept the legal opinion of a somewhat headstrong (Rec. p. 45) and inexperienced layman who frankly said he did not know the difference between a deed and a mortgage (Rec. p. 47) but considered the mortgage “a straight deed of reconveyance and not a mortgage” (Rec. p. 47), and then pointed to the defeasance clause to prove that it was a straight reconveyance (Rec. pp. 44, 48).

The Dorsey ex parte affidavit is simply a statement of “best recollection” in 1914 of a real estate transaction in 1899, and of the language of the papers therein.

It is an admitted fact that Captain Mathews, one of the mortgagees and a lawyer, bank president and real estate operator, personally prepared the papers, and that the “indenture” is on a printed New York mortgage blank, marked “mortgage”

at the top and on the cover, and that he afterwards declared it a mortgage transaction.

True, the Copper Estate never took possession of the land. Neither did Watts and Davis do so until shortly before starting the title suits (Rec. p. 51), and then only by means of making a lease in June, 1914, to a settler, on which no rental had been paid at the time of the trial (see record in No. 2719). No one in fact had any right to take possession of the land until after December 14, 1914, when it was segregated from the public domain by the filing of the plat of survey.

The prompt recording of the Copper Estate deed certainly showed that it "asserted ownership"; that is the best and usual evidence of such an assertion.

If there was no "debt" why were notes signed, delivered and sent in for collection, and why did the mortgage contain a promise to pay those notes and give a power of foreclosure on default? The absence of a debt would not convert the mortgage into a sale (*Russell v. Southard*, 12 How. 139, 152), but the existence of a debt is necessary to convert an apparent sale into a mortgage (*Conway v. Alexander*, 7 Cranch. 218, 237).

The quotation in the opinion from Section 265 of "*Jones on Mortgages*" is expressly applicable only to changing an "absolute deed into a mortgage". This Court is changing a mortgage into a deed and not a deed into a mortgage. The Court apparently overlooked the distinction.

Furthermore, the cited section (No. 265) from "*Jones on Mortgages*" is part of Chapter VII headed "Absolute Deed and Agreement to Re-convey", and of Part II thereof headed: "When they constitute a sale or a conditional sale".

Besides the distinction is clearly brought out by Section 277 of the same work (7th Ed. pp. 363, 364):

"But if the instrument on its face be a mortgage, or if a deed and bond of defeasance be executed together as part of the same transaction, and therefore constitute a mortgage, parol evidence is not admissible to show that the parties intended that the transaction should operate as a conditional sale. It is then for the court to construe the instruments and determine their legal effect. Parol evidence, if admitted, would contradict the writing; the court must construe the instrument without resort to parol proof. No agreement or intention of the parties, whether at the time of the transaction or subsequently, can change the redeemable character of a mortgage."

"And on the other hand parol evidence is admissible in equity to show that a formal conveyance with a defeasance executed at the same time or afterward, constituted in fact a mortgage and not a conditional sale."

"But although a formal conveyance can be shown to be a mortgage by extrinsic evidence a formal mortgage cannot be shown to be a conditional sale. The reason of the rule, that a formal conveyance may be shown by parol to be a mortgage, while a formal mortgage can not be shown to be a conditional sale by the same means, is, that 'in the one case such proof raises an equity consistent with the writing, while in the other it would contradict the writing.' "

To show that Mr. Jones appreciated the distinction he made, we refer the Court to his reiteration thereof in Section 499 of his two treatises on Evidence.

Daniels v. Lowery, 92 Ala. 519, was an action to declare an absolute deed to be a mortgage and has no application in this case.

Peugh v. Davis, 96 U. S. 332, was also an action to declare an absolute deed to be a mortgage. The Court therein stated (p. 337) that the equity of redemption cannot be waived at the time of the mortgage and that "this is a doctrine from which a court of equity never deviates".

In the case at bar, the equity of redemption in the mortgage is sworn away after a delay of sixteen years by the legal opinion of a lay mortgagee, in opposition to the legal opinion of the lawyer mortgagee (Rec. p. 59); and upon a statement of mixed colloquial and confused technical terms prepared by Mr. Davis (a lawyer) and signed by Senator Dorsey (a layman), to obviate the legal effect of what is clearly a mortgage, and solely on the legal opinion of two laymen.

Peugh v. Davis and the cases which follow it have never been applied to change a mortgage into a sale, but only to change a deed into a mortgage or to show illegal object in a transaction.

The citation from *Pomeroy's Equity Jurisprudence* is of a section headed: "A conveyance abso-

lute on its face may be a mortgage". Nothing more need be said.

Campbell v. Dearborn, 109 Mass. 130, was also an action to declare an absolute deed to be a mortgage.

The appellant was "resurrected and resuscitated" by the *appellees* who brought it into Court. On the day following the decision of the United States Supreme Court which put value into the property, appellees sought in high-handed fashion to debar the appellant from its lawful rights. The answer of the appellant was the natural and obvious response thereto.

The appellant does not contend that "it acquired title to 99,000 acres of land" under the transaction in question. This is explained elsewhere herein and ample refutation is made of the statement that appellant never "paid a dollar" for what it got.

The statement that the argument of the appellant, if successful, would constitute a "monstrous fraud" is an unjust and an unwarranted characterization of the statutes of limitation and the doctrine of laches, and of the argument of this appellant in an action in which it is defendant and not plaintiff.

FACTS OVERLOOKED BY THIS COURT.

In 1899 Mathews and Syme had been negotiating with Dorsey to sell him their title to Baca Float No. 3 for \$125,000 cash, and in May 1899 had

cancelled a contract of sale because Dorsey had not met a \$25,000 payment. On August 3, 1899, very shortly after the promulgation of the Secretary's opinion of July 25, 1899 (29 L. D. 44), which declared invalid the 1866 location to which Mathews and Syme claimed title, they went to New York. Instead of insisting upon \$125,000 cash, they accepted \$5,000 cash from Dorsey and \$100,000 in mortgage notes and divided the cash and the mortgage notes amongst themselves and Col. Boyce. They knew of the decision (Rec. p. 41), but apparently Dorsey did not (Rec. pp. 81, 83).

The statement in the opinion that nothing was ever paid for the property was inadvertently made. The statement of Col. Syme that he "considered" the transaction only an option and the \$5,000 as only consideration for the option must be considered in connection with the exigencies of the appellees' case. There is no dispute, however, that Mathews, Syme and Boyce divided \$5,000 cash amongst them on August 3, 1899, and also \$100,000 in mortgage notes.

There is also no dispute of the fact that immediately after the transaction, Senator Dorsey went to Washington and found that instead of getting a good title as had been represented to him, he had received something which was commercially impossible, its exact location in controversy, his title clouded by three conflicting chains of title, and the Government denying the validity of both locations

and of all the titles. This is what caused Dorsey to abandon the transaction (Rec. pp. 59, 81, 83). The blame should be placed upon Mathews and Syme, who sold the property, and not upon the Copper Estate whom they induced to buy it.

In this connection let it be stated that instead of the 99,000 acres mentioned in the papers and in the Court's opinion in this case, the utmost that the appellees herein contend in No. 2719 is that only one-half of that acreage could pass. The candid opinion of the counsel for the Santa Cruz Development Co. is that the papers passed title at most to only about 5,000 acres, being the overlap between the 1863 and 1866 locations.

If there is a potential "monstrous fraud" in this case, it is difficult to see where it occurred, what it was or who perpetrated it. Certainly if the Copper Estate had paid off the mortgage notes on their maturity in 1901, it would not have been the beneficiary of a good bargain. Until the mandate of the United States Supreme Court, in November, 1914, the United States Government contended that none of the title claimants had any title at all. When the title litigation is terminated, the winner or winners must still contend with numerous adverse settlers and patentees, pay about \$60,000 of taxes for 1915 and 1916, and contest about \$75,000 additional taxes. Besides this case and No. 2719, there will be at least two other difficult

cases to be decided by this Court or the United States Supreme Court.

CONCLUSION.

It is not for us to say, nor for this Court to decide, which party has abstract justice on its side. That can only be determined by considerations which do not appear upon this record and have no place therein. The appellees boldly and precipitously started the litigation in both cases—litigation which will undoubtedly end in the Supreme Court—and they must expect, when they ask the Court to remodel or disregard in whole or in part over a dozen deeds in No. 2719, and to make a summary and unprecedented disposition of the case at bar, that somewhere in their course they will be confronted with adverse rules of law and equity jurisprudence.

In order that the Bench and Bar may know the extent of this Court's decision, if this application be denied, we ask the Court to print in full in its opinion the mortgage from the Copper Estate to Mathews and Syme (with all its endorsements) from the original sent up with the record, the Mathews-Syme statement (Rec. p. 59), the Dorsey statement, and also a recital that the appellant was in fact duly incorporated, and that one of the mortgagees (a lawyer, bank president and real

estate operator) personally prepared the papers on a New York printed mortgage blank.

We certify that in our judgment this petition and application are well founded and not interposed for delay.

Respectfully submitted,

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*Counsel for Appellant
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

F. A. CUTLER,

*Of Counsel for Appellant
and Petitioner.*

